[redacted]

(27,155)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 400.

GEORGE G. LAMOTTE AND ANNA MARX LAMOTTE, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 7, 1920.

a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1918, of said Court, before the Honorable John E. Carland and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable James D. Elliott, District Judge.

Attest:
[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the eighth day of February, A. D. 1918, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein George G. LaMotte, et al., were Appellants, and the United States of America was Appellee, which said transcript was prepared, printed and certified by the Clerk of said District Court in pursuance of an Act of Congress approved February 13, 1911, and thereafter on the 25th day of March, A. D. 1918, a transcript of record pursuant to an appeal allowed by the said District Court was filed in the office of the Clerk of the said Circuit Court of Appeals in a certain cause wherein the United States of America was Appellant and George G. La Motte, et al., were Appellees, which latter transcript was prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk.

Said transcripts are in the words and figures following, to-wit:

1 & 2 *Citation.*

The United States of America, to the United States of America. Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the District Court of the United States for the Western District of Oklahoma, wherein George G. La Motte and Anna Marx La Motte, are Appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said George G. La Motte and Anna Marx La Motte, appellants, as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John H. Cotteral Judge of the District

Court of the United States for the Western District of Oklahoma this 21st day of November, A. D. 1917.

JOHN H. COTTERAL,
Judge of the District Court of the United States for the Western District of Oklahoma.

Due and personal service of the within citation is hereby accepted and acknowledged on behalf of the plaintiff herein this 22nd day of November, A. D. 1917.

JOHN A. FAIN,
United States Attorney.

Endorsed: Filed in District Court Nov. 22, 1917.

3 In the District Court of the United States for the Western District of Oklahoma.

No. 215. In Equity.

UNITED STATES OF AMERICA, Plaintiff,

vs.

GEORGE G. LA MOTTE and ANNA MARX LA MOTTE, Defendants.

Bill.

Comes now the United States of America, by John A. Fain, United States Attorney for the Western District of Oklahoma, by the authority and direction of the Attorney General, and, complaining of the defendants, alleges and states:

That the defendants, George G. La Motte and Anna Marx La Motte, are citizens of the United States, inhabitants thereof, and reside in Pawhuska, Osage County, Oklahoma, in the Western District of Oklahoma;

That, under and by virtue of the provisions of an Act of Congress of June 28, 1906, and the acts supplementary to and amendatory thereof, the plaintiff is imposed with the duty of supervising and controlling the leasing of lands, for grazing and agricultural purposes, belonging to incompetent Osage Indians who are members of the Tribe of Osage Indians in Oklahoma, and who have been allotted lands under and by virtue of said Act of Congress;

That, under the provisions of said Act of Congress, the Secretary of the Interior has made and prescribed certain rules and regulations in and to and regarding the leasing, for grazing and agricultural purposes, all the lands of incompetent Osage Indians belonging to the Tribe of Osage Indians in Oklahoma;

That, among other rules and regulations so made, as authorized by law, by the Secretary of the Interior, is a form of lease
4 known and described as a farming and grazing lease, a copy of which is hereto attached made part hereof and marked Exhibit "A".

That, among other provisions of said regulations prescribed by the Secretary of the Interior is one, in substance, that said lease shall be signed by the Osage Indian lessor, and acknowledged before an officer of the Osage Indian Agency, and that the said lease shall be executed in quadruplicate and thereafter approved by the Secretary of the Interior;

That it is further provided in said regulations that no lessee shall sub-let any part of the land mentioned in said lease without the consent and approval of the Secretary of the Interior;

That the lessee has no right under said lease, or particularly no right of occupancy and use of said land, until and after the above regulations have been complied with, and particularly until such lease be approved by the Secretary of the Interior;

That the defendants are pretending to be engaged in the business of leasing Osage Indian lands for the use of various and numerous persons, firms and corporations to graze cattle thereon, and for agricultural purposes;

That the manner and means of procuring leases for use as aforesaid, is, in substance, as follows: that the said defendants will solicit various incompetent Osage Indians to execute a lease upon lands allotted to them, which said leases are not in the form prescribed by the Secretary of the Interior, but are informal, in that they do not comply with the provisions of Exhibit "A";

That the defendants will continue to procure as many leases from as many allottees within a certain prescribed area until said defendants have, under the guise of said leases, obtained in their own name, or in the name of the person whom they represent, a body of land which they cause to be enclosed with fence, and denominate the same a "pasture"; that this "pasture" is then leased, or subleased, or contracted, to the person, firm or corporation desiring the use of the same to graze cattle thereon and for agricultural purposes;

that the said defendants charge said persons, firms or corpo-
5 rations, a large sum of money, and place said persons, firms or corporations, in possession of said land, and thereafter said lands are used by said persons, firms or corporations, for grazing purposes and for agricultural purposes, the said defendants guaranteeing to said persons, firms or corporations that they will pay all trespass money and all rentals, and that the defendants will assume all liability to the said persons, firms or corporations, that may be occasioned by the use and occupancy of the said lands as aforesaid;

That it is not the intention, nor the custom of said defendants, to have said leases, so procured from said incompetent Osage Indians, signed, subscribed and sworn to before an officer of the Osage Indian Agency; neither is it the intention nor the custom to submit said leases to the Secretary of the Interior for his consent and approval; but, that, on the contrary, immediately after the procurement of said leases as aforesaid, the said defendants, for a sum stated, proceed to place the person, firm or corporation desig-ing to use the said land, in possession.

The plaintiff alleges that the defendants have, by the aforesaid manner and means, acquired informal leases from incompetent Osage

Indians to the amount of approximately twenty-five thousand acres of land, the exact number of which the plaintiff is unable to ascertain, but alleges that it is informed and believes that the number of acres so acquired will far exceed the amount of twenty-five thousand acres.

The plaintiff alleges that, for a number of years past, the defendants have procured, by the manner and means aforesaid, "pastures" for H. M. Stonebreaker, T. P. Kyger, Lee Russell, Brown & Ellingwood, a partnership, R. H. Chowing, Thompson & Shipman, a partnership, Ross Heaton, and divers other persons, and have placed said persons and firms in possession, and have used and occupied lands belonging to incompetent Osage Indian allottees, for agricultural purposes and for grazing cattle, without complying with the rules and regulations of the Secretary of the Interior, as above set out, and without the knowledge or consent of the Secretary of the Interior; and that the defendants have established themselves in a permanent business conducted in the aforesaid manner, and are at the present time procuring, and will continue to procure,
6 leases as aforesaid, for persons, firms and corporations for the aforesaid purposes.

Plaintiff alleges that it is informed and believes that the defendants have obtained, or intend to obtain, informal leases in the aforesaid manner and without the knowledge and consent and approval of the Secretary of the Interior, to be used and occupied in the aforesaid manner, from the following incompetent Osage Indians, which said Indians and their lands are subject to the control and supervision of the Secretary of the Interior, and subject to the rules and regulations prescribed by the Secretary of the Interior respecting the leasing thereof for agricultural and grazing purposes, to-wit: Jessie McComb, Allottee No. 1543, S 1-2 SE 1-4 Section 9, SW 1-4 SE 1-4 Sec. 10, SE 1/4 SW 1-4 Section 10-27-7;

Wm. N. McComb, Allottee No. 1544, S 1-2 NW 1-4, N 1-2 SW 1-4 Sec. 10-27-7;

Rachel B. McComb, Allottee No. 1546, N 1-2 SE 1-4 Sec. 2, S 1-2 SE 1-4, SE 1-4 SE 1/4 Sec. 10-27-7;

Hallie Reece, Allottee No. 1723, SE 1-4 Sec. 3-27-7;

Gladys I. McComb, Allottee No. 1545, NE 1-4 NE 1-4 Sec. 11-27-7;

Rachel B. McComb, Allottee No. 1546, N 1-2 SE 1-4 Sec. 2, S 1-2 NE 1-4 Sec. 2, E 1-2 NE 1-4 Sec. 10, NE 1-4 SE 1-4 Sec. 10-27-7;

Robert A. Lombard, Allottee No. 1470, SW 1-4 Sec. 9-27-7;

Hiram Taylor, Allottee No. 1932, NW 1-4 Sec. 16-27-7;

Bessie Bruce (McCowan), Allottee No. 1003, SW 1-4 Sec. 16-27-7;

Lena Bruce, Allottee No. 1005, E 1-2 NW 1-4 Sec. 21, W 1-2 NE 1-4 Sec. 21-27-7;

Evart Cheshewalla, Allottee No. 578, E 1-2 SW 1-4, W 1-2 SE 1-4 Sec. 21-27-7;

Andrew Pryor, Allottee No. 612, SW 1-4 SW 1-4 Sec. 21, NW 1-4 NW 1-4 Sec. 28-27-7;

Heirs of Walter Harvey, deceased Allottee No. 48, E 1-2 NW 1-4 SW 1-4 NW 1-4 NW 1-4 NE 1-4 Sec. 28-27-7;

7 Heirs of Harold R. Hunt, deceased, Allottee No. 2203, S 1-2 Sec. 28-27-7;
Wah-hrah-lum-pah, Allottee No. 319, S 1-2 S 1-2 Sec. 27-27-7;
Cecilia Rogers, Allottee No. 1831, S 1-2 SW 1-4 NE 1-4 SW 1-4, SW 1-4 NE 1-4 Sec. 15-27-7;
Heirs of Hu-ah-me-tsa-he, deceased Allottee No. 86, SE 1-4 Sec. 15-28-6;
Hun-kah, Allottee No. 254, SW 1-4 Sec. 14, NW 1-4 NW 1-4 Sec. 23-28-6;
Heirs of Wah-shah-hah-me, deceased Allottee No. 317, SE 1-4 Sec. 14-28-6;
Heirs of Tsa-pah-ke-ah, deceased Allottee No. 485, SE 1-4 Sec. 15-28-6;
Heirs of Wy-u-hah-kah, deceased Allottee No. 636, NW 1-4 Sec. 24-28-6;
Heirs of Clarence Gray, Jr., deceased allottee No. 2161, S 1-2 NE 1-4, E 1-2 SW 1-4 Sec. 24-28-6;
Heirs of He-se-moie, deceased allottee No. 395, W 1-2 SW 1-4 Sec. 24, SE 1-4 SE 1-4 Sec. 23-28-6;
Shon-kah-mo-lah, Allottee No. 74, E 1-2 SW 1-4 Sec. 23-28-6;
Heirs of Wah-tsa-moie, deceased allottee No. 98, E 1-2 NW 1-4 NW 1-4 NE 1-4 NE 1-4 NW 1-4 Sec. 23-28-6;
Jessie James, Allottee No. 1379, SW 1-4 NE 1-4 S 1-2 NW 1-4 NW 1-4 SW 1-4 Sec. 23-28-6;
Ida M. Dunn, Allottee No. 1212, SW 1-4 SW 1-4 SW 1-4 Sec. 23-28-6;

And the plaintiff further alleges that the defendants have obtained, or intend to obtain, informal leases, in the aforesaid manner, for the aforesaid purpose, from divers other incompetent Osage Indians, with the intention of placing some person, firm or corporation in possession thereof, for agricultural and grazing purposes, without the knowledge, consent and approval of the Secretary of the Interior; and the plaintiff alleges that all of said leases are, and will be, invalid, and that it will necessitate the bringing of numer-
8 ous suits to oust the said defendants, and the persons, firms and corporations that defendants place in possession; and that the defendants will continue to procure said informal leases and to place various persons, firms and corporations in possession of lands which lands are subject to the control and supervision of the Secretary of the Interior; and that, to oust said defendants and persons, firms and corporations so placed in possession by them, will necessitate a multiplicity of suits, to-wit; in that the plaintiff would be compelled to bring a suit in ejectment for each particular allotment of land, against the defendants and each person, firm and corporation occupying a particular allotment of land, or a suit in ejectment against the defendants and persons, firms and corporations occupying a body of land collected by defendants as aforesaid and known as a "pasture;"

That the Secretary of the Interior has not and will not approve any such leases so obtained by the defendants as aforesaid, and did,

on or about the — day of September, —, notify the defendants, and each of them, that said leases would not be approved, and notified them to desist from their operations respecting allotted lands to incompetent Osage Indians as aforesaid, but that defendants have disregarded said instructions of the Secretary of the Interior, and have continued to procure leases and to place persons, firms and corporations in possession thereof as aforesaid, and will continue to do so, unless restrained by this Honorable Court.

Plaintiff further alleges that, by reason of the placing of various persons, firms and corporations in possession of said lands for use in agricultural and grazing purposes as aforesaid, thereby the defendants cause the said persons, firms and corporations to not deal in said lands with the Secretary of the Interior and the officials of the Osage Indian Agency; and persons desirous of obtaining lands for use in agricultural and grazing purposes rely upon said defendants to obtain "pastures"; and, as a consequence thereof, the Secretary of the Interior is unable to lease said lands according to his rules and regulations, and has no speedy and adequate remedy at law.

Wherefore, premises considered, plaintiff prays, in order that a *multiplicity* of suits may be avoided, and because plaintiff
9 has no speedy and adequate remedy at law, that this Honorable Court grant a restraining order against the defendants, and each of them, restraining them from entering into any lease, of any kind or character, with any incompetent Osage Indian, and by any means or manner, other than that prescribed by the Secretary of the Interior; and that they be further restrained and enjoined from using, occupying, and exercising any control, and from assigning and sub-leasing any lands informally leased or acquired, as aforesaid, from any incompetent Osage Indian member of the Osage Tribe of Indians in Oklahoma, without first having complied with the rules and regulations of the Secretary of the Interior; and for such other and further relief as the Court may deem right in the premises.

JOHN A. FAIN,
United States Attorney.
W. BOOTH MERRILL,
Assistant United States Attorney.

STATE OF OKLAHOMA,
County of Logan, ss:

A. T. Woodward, being first duly sworn, upon his oath says that he is an officer and agent of the plaintiff herein, and that he has read the foregoing bill and knows the allegations therein contained are true, except such allegations as are made upon information and belief, and as to the allegations so made he verily believes them to be true.

A. T. WOODWARD,

Subscribed and sworn to before me this 12th day of February, A. D. 1917.

[SEAL.]

M. V. HAWS,
Deputy Clerk U. S. District Court,
Western District of Oklahoma.

EXHIBIT "A".

Allotment No. —. Lease No. —.
Age of Allottee —.

Farming and Grazing Lease.

Osage Reservation, Oklahoma.

This indenture, in quadruplicate, made and entered into
10 this — day of —— 191— by and between —— —— a citizen of the Osage Nation, Allotment No. —, hereinafter called the lessor, and —— —— of ——, hereinafter designated as lessee, under and in accordance with the provisions of existing law and conformably to the regulations approved by the Secretary of the Interior on July 27, 1916, relative to farming and grazing leases, and which are hereby referred to and made a part of this agreement as fully as if recited over the signatures hereto:

Witnesseth: That for and in consideration of the rents, covenants and agreements hereinafter provided on the part of the lessee to be paid and performed, the lessor doth hereby let and lease unto the said lessee the lands and premises described as follows, to-wit:

.....

.....

in Osage County, State of Oklahoma, containing — acres, more or less, for the period of — years beginning on the — day of —— 191—, fully to be completed and ended on the — day of —— 191—, subject to the conditions hereinafter provided for.

The lessee hereby agrees to pay or cause to be paid to the Superintendent of the Osage Agency for the use and benefit of the allotted or his heirs * — Dollars ($—) per annum, being at the estimated rate of — per acre, payable semi-annually, as follows: $— on the first day of —— '19—; $— on the — day of ——191—, and — or will pay to the lessor, in lieu of (or in addition to) cash rental — shares of all crops raised on the leased premises as follows: —— payment of crop rental to be made as directed by and under the supervision of a representative of the Osage Agency.

In case the lessor is to receive a share of the crop the lessee shall provide for the careful storing of same, in case of grain, and the proper shocking or stacking of same; in case of feed or fodder, so as to prevent waste, except where the lease provides for a share of

*Insert "lessor or his heirs" in lieu of "Superintendent, etc." if authorized under section 5 of regulations attached.

stalk field, then no stacking or shocking is necessary. The-
11 Superintendent or his representative shall at all times have access to said premises for the purpose of seeing that the terms of the lease are being carried out or that the lessor's share of the crop is being properly taken care of and his interests protected.

As an additional rental consideration, the lessee agrees to break out and place in cultivation and to cultivate — acres of said land not now in cultivation before the — day of —, 19—, and will, at his own expense, within — from the date of approval of this lease by the Secretary of the Interior, build, construct and erect the following improvements upon the above described land: —— all of which are to be constructed in a substantial and workmanlike manner and of durable material, and subject to acceptance or rejection by the Superintendent of the Osage Agency; such improvements shall be on the leased premises at the date of the expiration of this lease, and in first class condition so as not to need repair, or the lessee shall be liable for the payment of the full value thereof as above set forth. The lessee shall not be released from his covenant to make the improvements and have the same on the leased premises at the expiration of the lease by reason of fire, flood, wind or any other cause.

There are now on said land the following improvements owned by the lessor: ——

The lessee further agrees to keep said premises in good repair; to work and farm said land in a good and husbandlike manner; to commit no waste thereon; and to take necessary steps to prevent said land from washing and ditches and gulleys from forming; to keep said lands free from noxious weeds, to not alter said premises except as may be herein provided; to at all times plow and tend said land to the best advantage of the lessor and the lessee; and turn over said premises to the lessor at the expiration of this lease peaceably and without legal process for the recovery thereof, and in as good condition as they now are, the usual wear and inevitable accidents excepted.

Any repairs made on the fences and buildings on said land by the lessee shall be considered to be done for his convenience and for such repairs he shall receive no compensation from the lessor, and the same shall become a part of the premises.

12 Said lessee further agrees where the land is to be used for grazing purposes to graze not to exceed one head of grown stock to each four acres each year and both before and after the introduction of any cattle on this land to comply with each and every provision, law and regulation now in force or hereafter to be promulgated by the United States Bureau of Animal Industry and the State Board of Agriculture of the State of Oklahoma as may be applicable where the lands herein described are situate, and before introducing any cattle to furnish the Superintendent of the Osage Agency with a certificate signed by an officer of said Federal Bureau and State Board, showing that their requirements have been fully complied with.

If the lessee shall fail to pay the rents when due, (or construct improvements on said land, as contracted for, in the manner herein provided), or shall fail to comply with or shall violate any of the provisions of this contract, the Secretary of the Interior

may, in his discretion, cancel this lease and the lessor may thereupon re-enter and take possession of said premises and eject the lessee therefrom, but such cancellation shall not release the lessee from paying all rents contracted for nor from damages for such failure or violation; (and there shall be a lien upon the crops grown or raised thereon as security for the payment of the rents). No rents paid under this lease shall be refunded to the lessee because of any subsequent surrender, forfeiture or cancellation of this lease.

The lessee further agrees that no live timber shall be cut and removed from the leased premises without the consent of the Superintendent of the Osage Agency; also that he will not permit intoxicating liquors to be introduced or used by himself or others on the above land and a violation of these requirements shall be considered sufficient cause for the cancellation of this lease.

It is distinctly understood that this lease does not cover any mineral rights in and to said land, and there is reserved to the Osage Nation and its lessees and assigns the right to use so much of the surface of the land described in this lease as may be necessary for conducting mining operations under any act of Congress now in force and the regulations promulgated by the Secretary of the Interior on August 26, 1915, and all future amendments thereto, or additional
13 regulations that may be prescribed governing mining or prospecting for mineral on Osage lands.

It is further expressly understood and agreed by the parties hereto that any sublease, assignment or transfer of this lease or of any interest herein or hereunder, can lawfully be made only with the consent of the lessor in writing and the approval of the Secretary of the Interior, and any assignment, sublease or transfer made or attempted without such consent and approval shall be void and may render this contract void at the option of the Secretary of the Interior.

The covenants and agreements hereinbefore mentioned shall extend to and be binding upon the heirs, executors and administrators of the parties to this lease.

It is further understood and agreed between the parties hereto that this lease shall be valid and binding only after approval by the Secretary of the Interior.

It is hereby expressly agreed and understood by the lessee that he has no right whatever under the within lease until the same shall have been approved by the Secretary of the Interior; and said lessee further specifically agrees and promises that he will not seize, enter upon or use said lands for himself or otherwise, nor will he authorize anyone else to do so prior to the approval of this lease by the Secretary of the Interior, and the notice of such approval received by lessee.

In Witness whereof the parties have hereunto set their hands and seals, the day and year first above written.

—— —— [SEAL.]
—— —— [SEAL.]

Signed and sealed in the presence of,

—— ——

—— ——

P. O. of both ——

—— ——

—— ——

P. O. of both ——

14 STATE OF OKLAHOMA,
—— *County, ss:*

On this — day of —, 19—, personaliy appeared before me the above named —— —— and ——, to me known to be the identical persons who executed the within and foregoing instruments as lessor and lessee, and acknowledged to me that they executed the same as their free and voluntary act and deed, and for the uses and purposes therein set forth.

I hereby certify that the contents, terms, conditions and effects of this lease were explained to and fully understood by the lessor and that said lease was signed and sealed in my presence and to the best of my knowledge and belief is in every respect free from fraud and deception, and that I am in no respect interested, directly or indirectly, in said lease.

—— ——,
Superintendent Osage Agency, Government Farmer, Notary Public.

Residing at ——.
My Commission expires ——.

Affidavit of Lessee.

State of ——, County of ——, *ss:*

I, —— ——, lessee herein, being first duly sworn, depose and say that I am leasing the lands herein described for my own use and benefit, and not either directly or indirectly, for the use or benefit of any other person or corporation; that I have no agreement, arrangement or understanding with any person or corporation whereby the said lands or any part thereof shall or may be used, enjoyed, or occupied by or for the benefit of any person or corporation other than myself.

—— ——

Subscribed and sworn to before me this — day of ——, A. D. 19—.

My commission expires —— ——.

—— ——,
Notary Public.

15 *Bond.*

In consideration of the letting of the premises described in the foregoing indenture of lease, and of the sum of One Dollar to each of us in hand paid, the receipt whereof is hereby acknowledged, we, the undersigned, —— ——, and —— —— of —— County of —— State of —— —— hereby become sureties for the punctual payment of all rents and the performance of all the covenants and agreements in the above lease, to be paid and performed by ——, the lessee named therein, and if any default shall be made therein we agree to pay on demand unto the Superintendent of the Osage Agency such sum of money as will be sufficient to make up the deficiency and fully satisfy all the conditions, covenants and agreements contained in said indenture of lease, without requiring notice of non-payment or proof of demand being made. And we do hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed and sealed this — day of,——, 19—.

Witness to Signature:

—— ——

—— ——

—— ——. [SEAL.]

—— ——. [SEAL.]

P. O. Addresses: ——

Verification of Sureties.

State of ——, County of—— *ss:*

—— —— and —— ——, the sureties to the foregoing indenture of lease, being duly sworn, and examined by me, state that they signed the foregoing obligation as sureties for the lessee under the annexed lease, and that they and each of them respectively own and possess property over and above all debts, liabilities and legal exemptions, of the value and worth of the sum placed opposite their names.

—— —— $——

—— —— $——

16 Subscribed and sworn to before me this — day of ——, A. D. 19—

My commission expires ——

—— ——

Notary Public.

Regulations.

Governing Agriculture and Grazing Leases in the Osage Nation, Oklahoma.

Allotted lands of the Osage Indians in Oklahoma, may be leased under sections 7 and 12 of the Act of Congress approved June 28, 1906 (43 Stat. L. 539), which provide:

Sec. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members or their heirs, shall have the right to use and to lease said land for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof; Provided, That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority; And Provided Further, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.

Sec. 12. That all things necessary to carry into effect the provisions of this act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior.

Regulations—Continued.

1. All leases must be submitted to the office of the Superintendent of the Osage Agency, at Pawhuska, Oklahoma, in quadruplicate, and on the form prescribed by the Department of the Interior. Farming leases will be executed preferably during the months of August and September, effective January 1 next after the date of execution; grazing leases in October and November, effectiv March 1 or April
17 1 next after execution. No leases dated or executed more than five months prior to the beginning of the term thereof will be received or considered, nor will any leases be received or considered unless signed and acknowledged by both parties and submitted to the office of the Superintendent of the Osage Agency within thirty days from the date of such lease. In case of duplicate leases, the right of priority shall be governed by the time of filing of lease in the office of the Osage Agency. The Superintendent is Authorized to reject forthwith any proposed leases submitted by persons whose presence on the reservation may be deemed by him detrimental to the welfare of the Indians, and no leases shall be considerd from persons delinquent in the payment of rentals under other leases unless such delinquency shall be adjusted to the satisfaction of the Superintendent.

2. Each lease must be accompanied by a bond with good and sufficient sureties acceptable to said Superintendent in a sum equal to one year's rent plus the value of any improvements to be made and in cases where demanded by the Superintendent the bond shall be increased to insure proper protection of improvements already on the land. Revenue stamps to be furnished by lessees should be attached to bonds as required by act of Congress.

3. In all cases where the lessor is a resident of Osage County, Oklahoma, leases must be acknowledged by such lessor before the Superintendent of the Osage Agency, or before any Government Far-

mer in Osage County (the Government Farmer to certify that the lease was fully explained to the lessor before signing); lessors residing outside of Osage County may acknowledge the execution of leases before any officer having authority to take acknowledgments. Lessees may execute leases before any officer having authority to take acknowledgments. Where leases are ackno-ledged before others than Government officers, the official character of the acknowledging official shall be certified in the manner prescribed by the law of the place of acknowledgment, and when requested, such evidence shall be attached to the leases or filed with the Superintendent of the Osage Agency; it must be shown that the party taking the acknowledgment is not interested directly or indirectly in the lease, and that the conditions, terms contents and effects of the lease were explained to and fully understood by the lessor prior to the
18 execution thereof. Leases executed before Government officials shall involve no expense for execution to the lessor.

4. Leases covering homesteads of allottees to whom certificates of competency have been issued or lands al-otted to or inherited by such allottee's minor children are invalid without the approval of the Secretary of the Interior as provided in these regulations.

5. All money due or payable under any form of lease shall be paid to the Superintendent of the Osage Agency for the use and ben-fit of the allottee or his heirs, except as hereinafter provided and shall be accounted for by him in the usual manner. The Superintendent is hereby authorized to pay on the lease roll all funds coming into his hands direct to the person entitled thereto citing these regulations and this paragraph as authority therefor. All moneys paid to the Superintendent on account of leases made for undertermined heirs, shall be deposited in bank to the credit of the estate and so held until the heirs have been determined, when it may be disbursed under special authority. All rentals under leases executed by legal guardians, administrators and executors appointed by courts of competent jurisdictions shall be payable direct to such guardians, administrators and executors by the lessees. In such cases as may be specifically authorized in writing by the Superintendent where the lessors are Osage citizens to whom certificates of competency have been issued, or are not enrolled as Osage citizens the lessee shall pay the cash rental direct to the lessor and shall when requested by the Superinte-dent furnish evidence of such payment; such written authority shall be attached to the lease and may be revoked at any time by the Superintendent in his discretion by written notice to the lessor and the lessee.

6. Farming leases shall be given preference over grazing leases. Leases providing for valuable improvements or a share of the crop rental shall be considered more desirable than leases providing for a money consideration alone. The value of all improvements should be shown in the lease. The making of farming leases for a crop rental consideration, wherever possible, shall be encouraged.

7. Lands of adults may be leased for terms not exceeding five years for farming purposes and not exceeding three years for
19 grazing purposes, except in cases where leases are made in favor of the oil or gas lessees of the lands when they may be made for the time the title to the minerals remains in the Osage tribe, with provision that the rental shall be adjusted every two years from the date of approval of such lease. Lands of minors may be leased for the same terms except that in no case shall the lease covering lands of a minor extend beyond minority. The ages of the minors shall be stated in the lease.

8. Where the parents are divorced or living separately the parent having the custody of the minor shall be the proper person to execute leases unless contrary instructions shall have been issued by the Commission of Indian Affairs. Where the parents are living together than either parent or both may execute leases as the Superintendent may determine.

9. Lands of deceased allottees may be leased by the heirs jointly, the natural or legal guardian shall act for minor heirs, and said Superintendent may execute leases in behalf of any absent heirs, or whose whereabouts is unknown. During the period of administration, lands may be leased by administrators or executors for a period not to exceed one year, or in case no administrator or executor has been appointed, the Superintendent of the Osage Agency may execute leases in behalf of the undetermined heirs, but all such leases shall require the approval of the Secretary of the Interior to be valid.

10. If no legal guardian has been appointed, the Superintendent shall execute leases in behalf of minor orphans and allottees who are non compos mentis.

11. When a lease covers only a part of an allotment, a definite description by subdivision or by metes and bounds must be incorporated therein, accompanied by a plat of the part intended to be leased when the metes and *bonds* do not conform to the public survey.

12. No lease shall cover the lands of more than one allottee unless the lands embrace allotments of members of a family, in which case the tracts leased must be described separately, so as to readily show the lands of each individual.

20 13. Every lessee will be required to execute an affidavit setting forth that he is leasing the lands described for his own use and benefit, and not for the benefit, directly or indirectly, present or prospective, of any other person, firm or corporation, except that this affidavit will not be required of oil and gas lessees in taking leases of the surface rights to the lands covered by their respective leases. Leases may be executed in behalf of lessees by duly authorized agents, and in such cases powers of attorneys, in duplicate, should be filed with the lease. Leases executed by a co-partner in behalf of a co-partnership as lessees should be accompanied by written evidence, in duplicate, of his authority to so act,

14. When leases covering the surface rights are taken by oil or gas lessees such leases shall be made upon the form provided herein for that purpose.

15. When leases have not been submitted through the Superintendent of Osage Agency for approval, as provided in these regulations and any person or persons are in possession of an allotment or allotments under an informal or oral agreement with the allottee, such person or persons will be considered intruders and subject to removal therefrom.

16. In the absence of the Superintendent of the Osage Agency all duties and powers conferred upon him by these regulations shall be assumed and exercised by the Officer in Charge of said Agency.

(Signed) E. B. MERITT,
Assistant Commissioner of Indian Affairs.

Approved: July 27, 1916.
AUDRIEUS A. JONES.
First Assistant Secretary of the Interior.

Farming and Grazing Lease.

—— ——

to

—— ——.

Department of the Interior.

—— ——.

The foregoing lease is —— approved.

—— ——,
Secretary of the Interior.
By —— ——,
Superintendent Osage Agency.

21

Endorsed: Filed in the District Court February 23, 1917.

Motion to Dismiss.

Comes now the defendants and move the court to dismiss the bill of complaint in this cause for the reasons following, to-wit:

First. There is a defect of parties complainant in that the real parties in interest, the incompetent Osage Indian allottees, for whom this action is brought, are not made parties to this suit.

Second. The United States has no pecuniary or other interest in the subject matter of the action, because the Osage Allottee for whom the action is brought is the sole party in interest, and the matters sought to be enjoined and the doing of the things sought to be enjoined, is authorized by law.

Third. The bill of complaint does not contain allegations sufficient to entitle the complainant to the relief sought.

Fourth. The complainant has an adequate remedy by proceeding in ejectment if the defendants take possession of any Osage Indian Allotments under an illegal or void contract.

LEAHY & MACDONALD,
Counsellors for Defendants.

Endorsed: Filed in the District Court March 15, 1917.

Order, March 15, 1917, Overruling Defendant's Motion to Dismiss Bill.

Now on this 15th day of March, 1917, this cause comes on for hearing upon motion of the defendants to dismiss the plaintiff's bill of compiaint. Plaintiff is present by John A. Fain, Esq., United States Attorney and the defendants are present by Messrs.
22 Leahy & Macdonald. Thereupon said motion to dismiss is presented to the court, arguments of counsel are heard and the court being fully advised in the premises and upon due consideration, it is ordered that said motion to dismiss be and the same is overruled, to which order and ruling of the court the defendants and each of them duly except.

Thereupon, the defendants are given ten days from this date in which to answer herein.

Joint Answer of George G. La Motte and Anna Marx La Motte.

Come now these defendants, and for answer to bill in equity in the above entitled cause, now and at all times hereinafter reserving all manner of benefit and advantage to themselves or exceptions to the errors and insufficiencies in said bill contained, say that the bill shows upon it- face, a lack of equity and shows that the court is without jurisdiction in equity and that the plaintiff has a plain, adequate and complete remedy at law; that the plaintiff has not capacity to maintain this suit and has no pecuniary interest in the subject mat-er of the action and that there is a defect of necessary parties to a complete termination of the controversy.

Defendants, for answer to said bill, say:

1st. That they deny all allegations in the biil except such as are expressly admitted herein.

2nd. These answering defendants admit that the Secretary of the Interior of the United States of America promulgated certain rules and regulations with reference to leasing Osage Indian lands, for farming and grazing purposes, a copy of which rules and regulations are attached to the bill, and admit that such rules and regulations purport to have been made under the acts of Congress as set out by complainant.

Defendanats further admit that they are leasing lands in Osage County from Osage Indians and other people for grazing and agricultural purposes on their own behaif, as on behalf of a number of persons, firms and corporations for whom they are acting as
23 agents.

Defendants say that they are the owners of a considerable amount of land situated in Osage county which they have purchased; that adjacent to some of such land, they are the owners of grazing and farming leases on other tracts, which grazing and farming leases they have secured from either people who own the fee to the land or are members of the tribe who have secured certificates of competency; that taking the land they own, together with the land upon which they have valid leases and which are in no way under the supervision or control of the Secretary of the Interior they are able to gather together tracts of considerable size; that there adjacent to these tracts lands which belong to members of the Osage tribe of Indaans who have not certificates of competency; that in order to lease their own lands for grazing purposes and to sublease such other lands as they have valid leases upon, to cattle men who desire and demand large acreage; it is necessary for them to agree with such cattle men that they will protect and guarantee them from damages by reason of trespass upon such Indian lands. These defendants deny that they take possession of such lands or that they deliver possession to their own lessee of the same, but merely hold themselves liable for any trespass money that may be due on account of stock running upon the same.

Defendants admit that they have taken a lease from Jesse McComb on the lands described in the bill for R. H. Chouning, which lease has not been su-mitted to the Secretary of the Interior for approval and which they intend to submit and admit that they have procured leases on the William N. McComb, Rachael B. McComb, and Gladys I. McComb lands described in the bill but allege and aver that they procured such leases in the name of R. H. Chouning, acting as agent and that they obtained the leases from Fletcher McComb, a white man, father of said persons, and who is not a member of the Osage tribe of Indians; that said William N. Rachael B. and Gladys I. McComb are all minor Osage allottees, and under the law, the parents of said minors have the control and use of said minor's lands, together with the proceeds of the same until the minors arrive at their majority and defendants allege and aver that said lease from said white parent is a valid lease without the approval of the Secretary of the Interior and that the Secretary
24 of the Interior is without authority to promulgate rules and regulations governing such lease by a white parent.

Defendants admit that they have leased the lands described in the bill as the Robert A. Lombard lands but allege and aver that the said Robert A. Lombard is a minor Osage Indian allottee whose father is dead and whose mother is a white woman and not a member of the Osage tribe of Indians; that the lease taken by the de-

fendants was executed by the mother of said minor and is valid without the approval of the Secretary of the Interior.

Defendants admit they procured a lease upon the lands allotted to Hiram Taylor described in the bill but allege and aver said lease was executed on behalf of said minor by Hugh Fitzer who is and was the duly and legally appointed, qualified and acting guardian of said minor and which lease is approved by the County Court of Osage County, Oklahoma; that said lease is valid without the approval of the Secretary of the Interior and the rules and regulations promulgated by the Secretary of the Interior requiring guardianship leases to be approved is without warrant or authority of law.

Defendants admit that they have procured leases on the lands of Bessie Bruce, Lena Bruce, Celia Rogers, Hun-kah and the heirs of Wah-tsa-moie described in the bill, said leases having been procured by these defendants as the agent of R. H. Channing for his sole use and benefit by these de- — upon Departmental forms as provided by the rules and regulations and are filed with the Department for the approval of the Secretary of the Interior. It is further alleged that Bessie Bruce, the father and mother of Celia Rogers and the father of Hun-kah all have certificates of competency and under the rules in force at the Osage Indian Agency the rentals due may be paid such parties direct; that said parties have been paid in full the rentals upon said lands. Defendants further allege that they have a lease upon the southeast Quarter of Section 14, Township 28, Range 6 described in the bill as belonging to the heirs of Wah-shah-kah-me, which lease is made by the guardian of the owner of said land and approved by the Secretary of the Interior.

Defendants further admit that they procured leases upon the lands of Evart Che-she-waila and Andrew Pryor, which leases are not approved and have not been submitted for approval, but allege
25 and aver that said parties are minors and the father of Che-Oshe-walla is dead and that the mother of said minors is a white woman and not a member of the Osage tribe of Indians and defendants' leases are executed by Florence Pryor, the white mother and are valid without the approval of the secretary of the Interior, and that said leases were not taken for the benefit of a member of the Osage tribe of Indians. Defendants further admit that they have a lease upon an undivided half interest in the lands described in the bill as the lands of the heirs of Walter Harvey and allege and aver that they procured a lease from R. C. Drummond, a white man and not a member of the Osage tribe of Indians, who is and was the owner of said undivided half interest in said land, and which undivided half interest is not restricted; that the other undivided half interest belongs to Mary Harvey, a non-competent Osage Indian; that defendants have no lease from Mary Harvey.

Defendants further allege and aver that they procured a lease on the lands described in the bill as belonging to the heirs of Harold R. Hunt, which lease was executed by Antwine Hunt; that said lease is not approved and is not taken in accordance with the rules and regulations and defendants allege that all of said lands are unrestricted; that the said Harold R. Hunt died August 25, 1909

intestate, leaving as his sole and only heirs at law, his mother, Hazel Hunt, a white woman and not a member of the Osage tribe of Indians and Antwine Hunt, a member of the Osage tribe of Indians and the father of decedent; that the said Antwine Hunt purchased the undivided interest of Hazel Hunt; that the said Harold R. Hunt died before the issuance of a deed to said property.

Defendants deny that they have procured any lease or that they are using or in the possession of or attempting to place others in the possession of the Wahphrah-hun-pah lands.

Defendants allege that they have procured a lease from the heirs of Hu-ah-me-tsa-he upon Departmental form, which lease is filed for approval with the Department; that they have procured from Joe Bates, the father of Hun-kah, Osage allottee No. 254, a lease upon the lands described in the bill in Departmental form, also a lease upon the Wah-tsa-mone lands described in the bill in Departmental form, which leases are submitted for approval; that they have
26 an approved lease from the heirs of Tsa-pah-ke-ah upon the allotment described in the bill.

Defendants further allege that some of the heirs at law of Wy-u-hah-kah mentioned in the bill have certificates of competency and that the said heirs can legally lease without the approval of the Secretary of the Interior; that these defendants procured a lease upon some of the lands allotted to Wy-u-hah-kah as mentioned in the bill, from Jennie Gray and John Oberly, heirs at law, said heirs having certificates of competency, and allege and aver that said lease is valid and binding without the approval of the Secretary of the Interior.

Defendants deny that they have procured any lease from the heirs of Clarence Gray or the heirs of He-se-mone or Shun-kah-mo-lah, or Jessie James or Ida M. Dunn upon any of the lands mentioned in the bill and disclaim any rights whatever in said lands, and deny that they, or either of them are in possession or have placed any other persons in possession of any of said lands.

Defendants further allege that they have procured a lease from the heirs of Wah-tsa-mone upon the lands mentioned in the bill as belonging to them, which lease is upon the approved forms and is filed with the Osage Indian Agent for approval by the Secretary of the Interior.

Defendants further allege and aver that all of the leases above mentioned from the above mentioned parties covering the above mentioned lands, with the exception of the lease from the heirs of Tsa-pah-ke-ah have been taken in the name of R. H. Chouning for his sole use and benefit by these defendants acting as the agents of said R. H. Chouning.

Defendants further allege and aver that there are many non-competent Osage Indians, members of the Osage tribe of Indians who have lands other than their allotments which they have acquired by inheritance, by will and by purchase, which lands so acquired by said Indians are alienable and subject to lease without the approval of the Secretary of the Interior and over which lands so acquired by the said non-competent Indians, the defendants allege and aver the said Secretary of the Interior and the Commissioner of Indian Affairs have no authority to regulate and no authority to promulgate

rules and regulations affecting said lands; that these defendants are leasing a great deal of said lands for themselves and as the
27 agents of other persons; that the said Interior Department claim the said rules and regulations apply to said lands and that the same cannot be leased without the approval of the Secretary of the Interior and the Department is assuming that the said rules and regulations apply to said lands, and are attempting to enforce the rules and regulations with reference to leasing said lands the same as if said lands were restricted lands; that there is no warrant of law or authority for the application of said rules and regulations to said lands, and these defendants deny that by virtue of the provisions of the acts of Congress of June 28, 1906, and April 18, 1912 that there is any duty imposed upon the complainant, the United States or its officers of supervising or controlling the leasing of said lands for grazing and agricultural purposes and deny that the Secretary of the Interior or the Commissioners have any control of same and deny that the rules and regulations have any force or effect with reference to said lands.

Defendants further allege and aver that they have a lease upon the East Half of the Southwest Quarter and the West Half of the Southeast Quarter of Section 10, Township 28, Range 7, in Osage County, Oklahoma, which is allotted to the heirs of Wah-tah-me-tsa-he, deceased, Osage allottee 770, which lease is executed in their favor by the heirs at law of said decedent, the said heirs being Ho-ki-ah-e, allottee 766 and Me-tsa-he, allottee 767, non-competent Osage allottees, which lease is not approved by the Secretary of the Interior and was not submitted for approval; that said lands are unrestricted and said heirs have a right to lease same without the approval of the Secretary of the Interior; that they have other leases of lands of like character from heirs who have not certificates of competency and defendants allege and aver that said leases are valid; that the Secretary of the Interior claims and assumes that the rules and regulations apply to such lands and he is attempting to enforce the said rules and regulations as against these defendants with reference to said lands the same as if said lands were the allotments of non-competent heirs.

Defendants further allege and aver that they have a lease upon the Northeast Quarter of Section 15, Township 28, Range 6 in Osage County, Oklahoma, said land being the allotment of Jack Wheeler, Osage allottee No. 728 and the said lease being executed by
28 Nah-me-tsa-he, Osage allottee No. 729, a non-competent Osage Indian, which lease is not approved by the Secretary of the Interior and was not submitted for approval; that the said Nah-me-tsa-he acquired said land as a devisee named in the last will and testament of said Jack Wheeler, that said land is therefore unrestricted and the said devisee has full control of said lands and the same is alienable without the approval of the Secretary of the Interior.

Defendants further allege that they have other leases of lands of like character from devisees who have acquired title to said lands by will, the said devisees being non-competent Indians; that the Secretary of the Interior assumes to and does apply the rules and regulations set out in the complainant's bill and contend that these de-

fendants cannot legally lease said land without his approval, but defendants allege and aver that said lands are alienable and the Secretary of the Interior is without authority to interfere with the defendants in the leasing of said lands of said character, and in attempting to apply the rules and regulations by him promulgated to said lands is acting without authority at law.

Defendants further allege and aver that they have a lease on the Northwest Quarter of Section 16, Township 27, Range 7, in Osage County, Oklahoma, said lands being the allotment of Hiram Taylor, a member of the Osage tribe of Indians and a minor; that said lease was procured by them through the guardian of said Hiram Taylor who was appointed by the County Court of Osage County, Oklahoma and which said lease is approved by the said county court; that Hugh Fitzer is the legally appointed, qualified and acting guardian of said minor and executed said lease with the approval of said court; that the defendants have other leases from the legal guardians of minor Osage allottees and guardians of Osage allottees who have been by the court declared incompetent, which leases have been approved by the county court of Osage County, Oklahoma, that said guardianship leases have not been submitted to the Interior Department for approval and has not been approved by the Secretary of the Interior; that the Department of the Interior assume control over said lands and assume to apply the rules and regulations to such leases and contend that these defendants must submit said leases for approval.

29 Defendants further allege and aver that they have procured a lease upon NW¼ & N½ of SW¼ of 21-29-7, lands in Osage County, Oklahoma, for H. M. Stonebraker the said lands being the allotments of Edward Gibson, deceased; that A. W. Hurley is the duly and legally appointed, qualified and acting administrator of the estate of said Edward Gibson, deceased, and executed said lease with the approval of the County Court of Osage County, Oklahoma; that these defendants have other leases made by the administrators of deceased Osage Indian estates with the approval of the county court of Osage County, which leases have not been submitted for approval to the Secretary of the Interior; and have not been approved by the Secretary of the Interior; that the Secretary of the Interior is attempting to apply the rules and regulations, so far as these defendants are concerned, to leases made by administrators and guardians and these defendants allege that under the Act of Congress approved April 18, 1912, the jurisdiction over said class of land is in the county courts of the state of Oklahoma, and that the Secretary of the Interior has no right or authority to promulgate rules and regulations affecting such leases and that the rules and regulations so promulgated in so far as they require the approval of the Secretary of the Interior of guardianship and administrator leases are without authority of law and of no force and effect; that the leases so made by guardians and administrators to these defendants with the approval of the county court of Oklahoma wherein the estate of the deceased Osage allottee or minor or the incompetent allottee is being administered, are valid without the approval of the Secretary of the Interior.

Defendants further allege that there is a great deal of lands in Osage

County, Oklahoma, originally allotted to members of the Osage tribe of Indians, the title to which is similar to the Walter Harvey allotments mentioned in the bill of complainant, and which lands are owned by tenants in common, some of which tenants in common have full authority to alienate, lease or incumber, so far as their interests are concerned, while a tenant in common owning a portion of the same land may be a non-competent Indian and the lands so far as such tenant is concerned being restricted lands that these defendants have leases from the tenants in common who are either white persons or Indians having a certificate of competency or Indians in whose hands the lands are alienable as is the case where these de-
30 fendants have a lease upon the Northwest Quarter of Section 24, Township 28, Range 6, in Osage County, Oklahoma, said lands being allotted to Wy-u-hah-kah, Osage allottee No. 631, mentioned in the complainants bill herein, that the Secretary of the Interior is attempting to apply the rules and regulations to such lands so far as the competent heirs are concerned and maintains that the defendants cannot legally lease said lands from said competent tenants in common where there are one or more non-competent tenants in common who own the lands jointly with a white person or an incompetent Indian; Defendants allege and aver that so far as such leases are concerned there is no warrant of law or authority for the application of the rules and regulations promulgated and defendants allege that where they have a lease upon lands held by tenants in common the said lease to be executed by one of tenants in common who is a white man, or whose interests in the lands are alienable, it is a valid lease without the approval of the Secretary of the Interior.

Defendants further allege and aver that the leases heretofore mentioned executed by white parents upon lands of their minor children who are members of the Osage tribe of Indians are valid and binding and that under the law applicable to Osage lands, the approval of the Secretary of the Interior is not necessary to their validity. These defendants allege that they have a number of leases on lands of minor Osage Indians, which leases have been executed by the white parents of such minors and which leases have not been approved by the Secretary of the Interior and the Department of the Interior is attempting to bar these defendants from the use of said lands, assuming said leases to be invalid.

The defendants further allege and aver that they have a lease on the South Half of the Southeast Quarter of Section 16, and the North Half of the Northeast Quarter of Section 21, Township 29, Range 8, said lands having been allotted to (Myrom) Bangs, allottee 403, deceased; that the heirs at law of Myron Bangs, deceased were determined to be Lucy Bangs, a non-competent Osage Indian and Myron Bangs, Jr., a minor who was born after allotment and who is not a member of the Osage tribe of Indians and who is not enrolled on the Osage tribal rolls; that the said interest in said lands of Myron Bangs, Jr., is unrestricted and alienable, and the said lands
31 are owned by Lucy Bangs and Myron Bangs, Jr., as tenants in common; that defendants hold a lease made on behalf of said Myron Bangs, Jr., which lease defendants allege and aver is valid and binding without the approval of the Secretary of the [

Wherefore, the defendants pray that the temporary injunction heretofore granted in this cause be dissolved and that they be wholly relieved from the same; that the court declare and decree that these defendants may, without any violation of any authorized rules and regulations of the Secretary of the Interior, lease lands from the parents of minor Osages; also lands which are under the control of guardians and administrators duly appointed by the County Court of Osage County, Oklahoma and lands which are inherited by members of the tribe from deceased members of the tribe, even though such members do have certificates of competency, without conforming to the rules and regulations of the Secretary of the Interior concerning the leasing of Osage Indian lands and that the court decree that the Secretary of the Interior has no authority under the law to promulgate rules and regulations concerning the leasing of lands of any of the members of the Osage tribe of Indians and define and determine the authority of the Secretary of the Interior concerning the approval of farming and grazing leases of lands belonging to members of said tribe and for such other and further relief as the said defendants may in equity and good conscience be entitled to.

T. J. LEAHY,
C. S. MACDONALD,
Attorneys for Defendants.

STATE OF OKLAHOMA,
County of Osage, ss:

Anna Marx La Motte, being first duly sworn upon her oath says that she has read the foregoing answer and knows the contents thereof and that the allegations of fact contained therein and which are stated to be facts, are true; that all other allegations contained therein she believes to be true.

ANNA MARX LA MOTTE.

Subscribed and sworn to before me this 30th day of March, 1917.

VICTORIA ISNARD,
Notary Public.

32 My commission expires July 14, 1917.
[SEAL.]

Endorsed: Filed in District Court March 31, 1917.

A Condensed Statement of the Evidence.

1. The defendants, and each of them, are inhabitants of Pawhuska, Osage County, Oklahoma, and are engaged in the business of buying and selling real estate, loaning money, leasing lands for agricultural and grazing purposes on behalf of themselves and representing other persons in procuring leases for said other persons as the agents of said other persons, and in pasturing cattle for other persons upon their own lands and upon lands leased by these defendants in the names of the defendants;

2. The defendants procured leases in the name of R. H. Chowning, acting for him and on his behalf, on the lands described in the bill as the Jessie, Wm. N., Rachel B. and Gladys I. McComb, and Hallie Reece allotments, which leases were not upon the forms prescribed by the Secretary of the Interior, and which leases were not approved by the Secretary of the Interior; nor submitted to him for approval. All of said allottees are minors under the age of twenty-one years, and the said lands were allotted under the Act of Congress approved June 28, 1906, to the respective parties, who are members of the Osage Tribe of Indians; and said leases so taken on the lands of the McComb minor children were executed by Fletcher McComb, the father of said minors, who is a white man and not a member of the Osage Tribe of Indians, and Ellen McComb, the mother of said minors, the said Ellen McComb being a member of the Osage Tribe of Indians to whom a certificate of competency was issued and delivered under the Act of Congress aforesaid prior to the execution of said leases. The lease taken on the Hallie Reece allotment was executed by Elizabeth Reece, the mother of said minor and a member of the Osage Tribe of Indians to whom a certificate of competency had, prior to said time, been issued and delivered under said Act of Congress, and Dr. Hal Reece, the father of said Hallie Reece, who is a white man and not a member of the Osage Tribe of Indians. The lands referred to herein were allotted as surplus lands, except the N½ of the
33 SE¼ and S½ of the NE¼, Sec. 2 Twp. 27 R. 7, which was allotted to Rachel B. McComb as a homestead. The defendants, for themselves, and as agents of other persons, have taken and procured leases of like kind and character upon other lands in Osage County, Oklahoma, of like kind and character, in some cases both parents of the minors being members of the Osage Tribe of Indians to whom certificates of competency had been issued and some cases being where one parent held a certificate of competency and the other parent was not a member of the Osage Tribe of Indians;

3. The defendants procured leases upon the lands described in the bill as allotted to Robert A. Lombard, Evart Cheschwalla, and Andrew Pryor, which leases were executed to R. H. Chowning, lessee, and were procured by the defendants as agents of said R. H. Chowning. The said allot-ees mentioned in this paragraph are all minors and members of the Osage Tribe of Indians and the fathers of Robert A. Lombard, Evart Cheshewalla and Andrew Pryor were members of the Osage Tribe of Indians but died some years ago. The mothers of said Robert A. Lombard, Evart Cheshewalla and Andrew Pryor were white women and not members of the Osage Tribe of Indians. The leases were executed on the Robert A. Lombard, Evart Chesewalla and Andrew Pryor allotments by said mothers. The above described lands were allotted as surplus lands. The defendants, for themselves and as agents of other persons, have taken and procured leases of like kind and character upon other lands in Osage County, Oklahoma, of like kind and character, from the mothers of minor allottees, said mothers of said allottees being white women and not members of the Osage Tribe of Indians;

4. The defendants procured a lease on the lands allotted to Hiram Taylor, and the lands described in the bill as belonging to the heirs of Wah-shah-hah-me, in the name of H. H. Chowning, the defendants acting as his agent. The lease on the Hiram Taylor allotment was executed by the guardian of Hiram Taylor, which guardian was appointed by the County Court of Osage County, Oklahoma, and said lease was approved by said County Court. The lands mentioned as being allotted to Wah-shah-hah-me were inherited by Peter
34 Kenworthy and others, all of the heirs being members of the Osage Tribe of Indians and none of said heirs having certificates of competency. The lands allotted to Wah-shah-hah-me were partitioned and the particular land described in the bill as being the lands allotted to said persons were in said partition suit set aside to Peter Kenworthy, said Peter Kenworthy having elected to take said lands, and by the judgment of the District Court of Osage County, Oklahoma, the sheriff was ordered to and did execute a deed to said Peter Kenworthy, which partition proceedings and deed were approved by the Secretary of the Interior. Peter Kenworthy is a minor under the age of twenty-one years and Ed T. Kennedy is the duly and legally appointed guardian of said Peter Kenworthy, and the lease on said land is executed by said Ed T. Kennedy and approved by the County Court of Osage County, Oklahoma. The above described lands were allotted as surplus lands.

5. The defendants procured a lease in favor of R. H. Chowning, executed by Bessie Bruce upon the lands described in the bill. Prior to the execution of said lease a certificate of competency was issued and delivered to said Bessie Bruce under said Act of Congress. The lands so leased are the homestead selections of said Bessie Bruce;

6. The defendants have taken a lease upon the allotment of Lena Bruce described in the bill, which land was allotted her as surplus lands under the Act of Congress aforesaid. Lena Bruce has never received a certificate of competency under said Act. The defendants have taken some other leases in their own names on other lands of like kind and character from allottees of the Osage Tribe of Indians to whom certificates of competency have not been issued, and, acting as the agent for other persons, have procured leases to be executed in favor of such other persons on lands of like kind and character;

7. The lands described in the bill as belonging to the heirs of Walter Harvey, deceased, were allotted to him as surplus lands under said Act of Congress and his heirs at law have been determined to be Mary Harvey, a non-competent Osage Indian, and Luther Harvey, a member of the Osage Tribe of Indians to whom a certificate of competency has been issued and delivered, said parties being the parents of said Walter Harvey. Said parties inherited said
35 land equally, and the undivided one-half interest of Luther Harvey has passed by foreclosure proceedings to R. C. Drummond, a non-member of the Osage Tribe of Indians. R. C. Drummond, a white, man, executed a lease to these defendants Mary Harvey executed a lease to the defendants for her interest, but said

leases have not been submitted to the Department of the Interior for approval and are not upon the forms prescribed and are not in acordance with the rules and regulations of the Department of the Interior;

8. The defendants procured a lease upon the lands described in the bill as allotted to Harold R. Hunt, deceased. Said lease was executed by Antwine Hunt, father of said deceased and a non-competent Osage Indian. The heirs of said Harold R. Hunt, deceased, were legally determined to be said Antwine Hunt and Hazel May Hunt and said parties succeeded equally the estate of said deceased. Hazel May Hunt is not a member of the Osage Tribe of Indians but is a white woman, and she conveyed her interest in said lands to Joseph D. Mitchell, and said Antwine Hunt subsequently purchased said undivided interest from said Joseph D. Mitchell. At the time said Antwine Hunt executed said lease he owned the entire tract of land and said lease was not executed upon the forms prescribed by the Department of the Interior's rules and regulations and was not submitted to or approved by the Secretary of the Interior. The above described lands were allotted as surplus lands.

9. The defendants procured a lease to be executed in the name of R. H. Chowning on the lands described in the bill as allotted to Cecelia Rogers, at the time acting as the agent of said R. H. Chowning. Said lands were allotted, as surplus land under the Act of Congress above mentioned, and said [Decelia] Rogers is a minor under the age of twenty-one years. The lease was executed by Jasper Rogers and Ro a Rogers, father and mother of said minor, and at the time of the execution of said lease a certificate of competency had been issued and delivered to said parents of said minor under the Act of Congress above mentioned;

10. The defendants procured a lease in favor of R. H. Chowning, acting as his agent, on the lands described in the bill as allotted to Hun-kah; that said allottee is a minor under the age of twenty-one years, and said lease was executed by Joseph Bates the father of said minor and a member of said Osage Tribe of Indians
36 to whom a certificate of competency had prior thereto been issued and delivered under said Act of Congress above mentioned. The mother of said minor is a member of the Osage Tribe of Indians and has never received a ce-tificate of competency. Under the custom, usage and practice of the Department of the Interior it is permissable for the head of the family, being a member of the Osage Tribe of Indians, to lease his minor child's land and receive the rentals, and under the rules of the Department of the Interior it is not necessary that the wife of the lessor, or the mother of the minor child, as in this case, execute said lease jointly with the father. The above described lands were allotted as surplus lands.

11. The defendants have a lease executed by the heirs of Tsa-pah-ke-ah on the lands des-ribed in the bill as belonging to his heirs, which lease is in accordance with the rules and regulations of and duly approved by the Secretary of the Interior;

12. The lands described in the bill as belonging to Wy-u-hah-kah were allotted to him under said Act of Congress, and said allottee is dead. His estate has been duly administered in the County Court of Osage County, Oklahoma, and his sole and only heirs at law determined to be Hau-ah-me-tsa-he, who succeeds an undivided one third interest, is a member of the Osage Tribe of Indians to whom a certificate of competency has not been issued, Jennie Gray who succeeds to an undivided two-ninths interest and John Oberly who succeeds to an undivided two-ninths, both of said parties being members of the Osage Tribe of Indians to whom certificates of competency had been issued, and Andrew Penn and Grace Morrel, who succeed to a one-ninth interest each; that Andrew Penn is dead and during his lifetime no certificate of competency had been issued. The estate of said Andrew Penn, deceased, is now being administered in the County Court of Osage County, Oklahoma, and said Andrew Penn died intestate. The lands in this paragraph mentioned, together with other lands, are the subject of action in a partition suit now pending in the District Court of Osage County, Oklahoma. Since the plaintiff herein instituted this suit the defendants have purchased from the said Jennie Gray and John Oberly an undivided four-ninths interest in said land, said parties conveying said four-ninths interest to these defendants by a warranty deed.

37 The defendants are using said lands and are ready, able and willing to pay to the non-competent tenants in common their portion of the share of the usable or rental value of said lands. This land was originally allotted as surplus lands.

13. The land described in the bill as belonging to the heirs of Wah-tsa-moie, deceased, were allotted to him as surplus lands under the aforesaid act of Congress, and the heirs at law of said decedent have been determined to be Martha Pryor, Michael Wah-tsa moie and Harry Wah-tsa-moie, and each succeeded to an undivided one-third interest therein. Said heirs, with the exception of said Harry-Wah-tsa-moie, are members of the Osage Tribe of Indians and have no certificates of competency. Harry Wah-tsa-moie was not a member of the Osage Tribe of Indians and not enrolled as such on the approved rolls of said tribe. Subsequent to the time the undivided one-third interest in said property was cast upon said Harry-Wah-tsa-moie he died intestate and his mother, Martha Pryor, succeeded, as the heir at law of said Harry Wah-tsa-moie, to the said undivided one-third interest in said lands so inherited by him; the defendants purchased from Martha Pryor the undivided one-third interest which she inherited from Harry Wah-tsa-moie and said interest was conveyed by a warranty deed to them by said Martha Pryor and they are now claiming under said deed of conveyance to be the owners of the undivided one-third interest in said land. Said defendants are able, ready and willing to pay their tenant in common two-thirds of the usual value or rental of said premises. The defendants are in possession of said premises and using the same. Martha Pryor is an adult and consents to the defendants occupying said premises and paying her her portion of the usable or rental value thereof. Michael Wah-tsa-moie is a minor under the age of twenty-one years;

14. The defendants have no lease and have not procured any lease or leases for anyone else and are not using any of the lands described in the bill as allotted to Wah-hrah-lum-pah, Clarence Gray, Jr., He-se-moie, Shon-kah-mo-lah, Jessie James, Ida M. Dunn and Hlu-ah-me-tsa-he;

15. The defendants have a lease upon the E 1-2 of SW 1-4 and the W 1-2 of SE 1-4 of 10, 28 N., 7, in Osage County, Oklahoma, which was allotted as surplus lands under the aforesaid Act of Congress to the heirs of Wah-shah-me-tsa-he, deceased Osage allottee No. 770. Said allottee died intestate on August 3, 1907, and at the time of her death had not selected any lands under said allotment Act. The deed issued under said Act of Congress conveys said land to the heirs of Wah-shah-me-tsa-he, deceased. The sole heirs at law of said deceased allottee are Ho-ki-ah-se and Me-tsa-he, both non-competent members of the Osage Tribe of Indians and adults. Said lease upon said lands to these defendants is executed by said sole heirs at law and is not upon the Departmental form and is not made and approved in accordance with the rules and regulations of the Department of the Interior, and said lease has never been submitted for approval. In addition to this lease the defendants have leases on other lands allotted as described in this paragraph, the leases being executed by members of the Osage Tribe of Indians who are of the same status as the heirs above mentioned, which leases are not approved by the Secretary of the Interior;

38

16. The defendants have a lease upon the NE 1-4 of 15, 28 N. 6, in Osage County, Oklahoma, which land was allotted as surplus lands to Jack Wheeler, Osage allottee No. 728. Jack Wheeler died testate on the 16th day of May, 1916, leaving a will which has been approved by the Department of the Interior and which will has been filed and probated by the County Court of Osage County, Oklahoma, and the estate of said Jack Wheeler is now pending settl-ment in said court. This will reads as follows:

Know all men by these presents:
That I Jack Wheeler, an Osage allottee do hereby make, publish and declare this as my last will and testament.

First. I give bequeath and devise unto my wife Nah-me tsa-he all of my property of which I may die possessed or seized both real, personal and mixed.

Second. I desire that out of my property my indebtedness for last sickness be paid, and it is my wish to pay and I hereby give and devise unto H. H. Brenner, a sufficient amount of my property to pay any indebtedness to him in the sum of between Thirteen and Fourteen Hundred Dollars. Also I desire that the Wynona Bank of Wynona be paid Sixty Dollars, and Mr. Badger about Twenty Dollars, which sums I owe them.

39 In witness whereof I have subscribed my name by causing same to be subscribed and witnessed at Pawhuska, Oklahoma this 15th day of May 1916.

JACK WHEELER. his X mark

I signed the name of Jack Wheeler at his request and in his presence and witnessed his mark.

AUGUSTUS CHOUTEAU.

I also witnessed his mark.

C. S. MACDONALD.

The foregoing instrument on the reverse side of this sheet of paper was signed and published as and for his last will in our presence and in the presence of each of us, and we at the same time, at his request and in his presence and in the presence of each other hereto subscribe our names and residences as witnesses.

C. S. MACDONALD,
Pawnuska, Okla.
W. R. SENECA,
Pawhuska, Okla.

I, Augusta Chouteau, hereby certify that I interpreted the foregoing will from the English language into the Osage language and explained the same fully to Jack Wheeler, that he fully understood same and the Will was drawn by C. S. Macdonald, who wrote what Jack Wheeler stated to me he wanted—that after said Will was written I read it and explained same to Jack Wheeler who stated it was what he desired.

Witness my hand this 15th day of May, 1916.

AUGUSTUS CHOUTEAU.

Endorsed.

864.

Department of the Interior.
Office of Indian Affairs.
Aug. 26, 1916.

It is respectfully recommended that the within Will be approved in pursuance of the provisions of the Act of April 18, 1912. (37 Stat. L., 86, 88.)

Respectfully,

E. B. MERRITT,
Assistant Commissioner.

40 Department of the Interior,
Office of the Secretary,
Aug. 31, 1916.

The within Will is hereby approved in pursuance of the provision of the Act of April 18, 1912. (37 Stat. L., 86, 88)

BO. SWEENEY,
Assistant Secretary.

Rec. Will R. 1, Page 18.

County Court, State of Oklahoma, Osage County, Pawhuska, Oklahoma. Filed Oct. 4, 1916. Thos. Leahy, Clerk, by Belva L. Moore, Deputy.

Duly Certified.

The lease above mentioned was executed by Nah-me-sa-he, the beneficiary named in this will, and executed after the death of said Jask Wheeler. Nah-me-tsa-he is a member of the Osage Tribe of Indians to whom a certificate of competency has not been issued. The lease taken by the defendants is not taken in conformity to the rules and regulations promulgated by the Department of the Interior and has never been submitted to the Department of the Interior. The defendants have other leases upon other lands which have been likewise devised by Osage Indians, the devisees being non-competent Osage Indians and the wills being approved by the Department of the Interior.

17. The defendants have a lease upon the NE 1-4 of 9, 25 N., 7, in Osage County, Oklahoma. This land was allotted as homestead lands under the Act of Congress above mentioned to the heirs of Walter Florer, deceased. Walter Florer was enrolled upon the Osage tribal rolls and died intestate between January 1, 1906, and June 28, 1906. Consequently, said decedent had not selected any land under said allotment Act at the time of his death. The sole heir at law of said Walter Florer has been legally determined to be and is Kah-wah-e, Osage allottee No. 88, now deceased. Kah-wah-e died leaving a will which has been duly approved by the Secretary of the Interior. This will reads as follows:

41 *Last Will and Testament of Kah-Wah-C.*

I, Kah-wah-e, Osage Allottee No. 88, being of sound mind, memory and understanding, do hereby make, publish and declare this instrument as and for my last will and Testament.

First. I hereby direct my last sickness and funeral expenses paid as soon after my death as may be.

Second. I hereby devise to my wife, Ke-ah-som-pah, a life interest in my homestead allotment.

Third. I hereby give and bequeath to my wife, Ke-ah-som-pah, one-third of all oil and gas royalties, either allotted to or inherited by me, of which I may die possessed, or which may accrue after my death.

Fourth. I hereby give and bequeath to my wife, Ke-ah-som-pah, one-third of all trust funds, or other funds of which I may die possessed.

Fifth. I hereby devise unto my wife, Ke-ah-som-pah, my undivided one-half interest of, in and to the second and third selections of land allotted to my deceased children, Nah-so-su-pah No. 94 and Kah-ah-som-pah No. 93.

Sixth. I hereby devise unto my daughter, Annie Yellow Horse, my homestead allotment, subject to the life interest of my wife, Ke-ah-som-pah.

Seventh. I hereby devise unto my daughter, Amanda Claremore, the second selection of land allotted to me.

Eighth: I hereby devise unto my son, Joe Bates, the third selection and fraction of fifteen acres in Sec. 24, Twp. 28, R. 9, of land allotted to me.

Ninth. I hereby give and bequeath unto my son, Ah-kah-hu (John Yellow Horse) one-third of all trust funds and other funds of which I may die possessed.

Tenth. I hereby give and bequeath unto my son, Ah-kah-hu (Yellow Horse) one-third of all oil and gas royalties [wither] allotted to me or inherited by me, of which I may die possessed, or which may accrue after my death.

42 Eleventh. I hereby give and bequeath unto my daughter, Maggie Godde, one-third of all trust funds, and other funds of which I may die possessed.

Twelfth. I hereby give and bequeath unto my daughter, Maggie Godde, one-third of all oil and gas royalties, either allotted to me or inherited by me, of which I may die possessed, or which may accrue after my death.

Thirteenth. I hereby give and bequeath unto my son-in-law, John Claremore, my ceremonial arrow and gourd, together with the paraphernalia connected therewith.

Fourteenth. All the rest, residue and remainder of my estate, of whatsoever kind, and wheresoever situate, I give, devise and bequeath unto my wife, Ke-ah-som-pah.

Fifteenth. All devises of real estate made hereunder are made subject to the condition that the said real estate shall not be encumbered or alienated without the consent of the Secretary of the Interior.

In witness whereof, I have hereunto set my hand this fourth day of March, 1916.

(His Thumbmark.)
KAH-WAH-C.

I signed the name of Kah-wah-c hereto at his request and in his presence.

A. T. WOODWARD.

Signed, published and declared by [Wah-wah-c,] Osage Allotte No. 88 to be his last Will and Testament, and subscribed to by us as witnesses, who sign as such at the request and in the presence of the testator and in the presence of each other.

(Government Interpreter) ARTHUR BONNICASTLE,
Pawhuska, Okla.

(Government Attorney) A. T. WOODWARD,
Pawhuska, Okla.

(Government Farmer) R. M. WEIMER,
Fairfax, Okla.

I certify that above named parties are in Government employ, as indicated.

J. GEORGE WRIGHT,
Supt. Osage.

43 I hereby certify that I fully and correctly interpreted the foregoing instrument to the testator, Kah-wah-c, and he clearly understood the terms thereof.

ARTHUR BONNICASTLE,
Interpreter.

Endorsed on Back:

Department of The Interior. Office of Indian Affairs. July 19, 1916. It is respectfully recommended that the within will be approved in pursuance of the provisions of the Act of April 18, 1912. (37 Stat. L., 86, 88.) Respectfully, E. B. Merritt, Asst. Commissioner.

Department of the Interior. Office of the Secretary. July 21, 1916. The within will is hereby approved in pursuance of the provisions of the Act of April 18, 1912. (37 Stats. L., 86, 88). Andrew A. Jones, Assistant Secretary.

Recorded July 26, 1916.

County Court, State of Oklahoma, Osage County Pawhuska, Oklahoma. Filed Aug. 7, 1916. Thos. Leahy, Court Clerk, By A. E. Cotter, Deputy.

Rec. Will Rec. 1, Page 6 & 7.

This will has been duly probated by the County Court of Osage County, Oklahoma, and under said will said County Court has rendered judgment, adjudicating Ke-ah-som-pah, one of the beneficiaries

named in said will, to be the owner of and entitled to the lands described in this paragraph, and that she takes said land under said will. The said Ke-ah-som-pah sold the land described in this paragraph and conveyed the same by a warranty deed to a white man and the said grantee of said Ke-ah-som-pah leased said land to these defendants, which lease is not approved by the Secretary of the Interior and is not upon the form prescribed by the Department of the Interior or in accordance with the rules and regulations of the Department of the Interior; that the said Keh-wah-e and the said Ke-ah-som-pah never received a certificate of competency under the said Act of Congress;

18. H. G. Ezell has a lease on the lands described in the bill as the Jesse James surplus allotment, which lease was approved by the Secretary of the Interior. Said lease is made for grazing and agricultural purposes and the lands in question is only valuable for grazing purposes. The defendants have valid leases on lands adjacent to the land leased to H. G. Ezell, to wit, the Jesse James allotment, which lands are used for grazing purposes. The lands leased by H. G. Ezell and the lands leased by the defendants are not separately fenced but are situated in a large pasture which included other lands and the entire tract is surrounded by a fence. The defendants in grazing their lands do not fence their lands separately and, consequently, their cattle stray upon and graze the said lands leased to H. G. Ezell. The said H. G. Ezell has paid the allottee the full consideration for said lease and straying of said cattle upon the Ezell lease does not injure the lands other than that the cattle eat the grass grown thereon;

19. The leases above mentioned as being held by the defendants or their agents, were not drawn on the form prescribed by the Regulations promulgated by the Secretary of the Interior, nor were they submitted for approval or approved by the Secretary of the Interior in compliance with said regulations, except as herein specifically set out. The form for Farming and Grazing leases herein referred to, with the rules and regulations governing the execution and approval of the same printed thereon, is set out in full in the bill of the plaintiff is referred to, and is by reference incorporated herein.

It is stipulated and agreed that the above and foregoing constitutes a true and correct condensed statement of the evidence in the above entitled cause, and that the same may be presented to the Judge of the United States District Court for the Western District of Oklahoma for his approval on the 10 day of January, 1918. All parties hereto waive all required notices of the time and place of presenting the same for approval and settlement, and consent that the same may be approved and settled without the presence of counsel for either party, and the same may be approved, filed and used for the purposes of an appeal and cross appeal.

T. J. LEAHY,
C. S. MACDONALD,
Attorneys for Appellant.
REDMOND S. COLE,
Assistant United States Attorney and Attorney for Appellee.

45 The foregoing condensed statement of the evidence in this cause, being presented to me for approval, I hereby approve the same as true and correct, and direct that it be filed and made a part of the record, for the purpose of an appeal and cross appeal.

January 10, 1918.

JOHN H. COTTERAL,
District Judge.

Endorsed: Filed in District Court January 10, 1918.

Memorandum of Rulings as Basis for Final Decree.

The complaint is for continuing procurement of leases of allotted lands from certain incompetent Osage Indians and divers other Osage Indians, also incompetent, without the approval of the Secretary of the Interior, inclosing the lands into a pasture and furnishing them by lease or contract to persons, firms and corporations for use in grazing their cattle.

The ruling heretofore made as to the sufficiency of the bill is adhered to. The Government has the right and the duty to sue for the enforcement of its policy toward the Osage Indians as contained in the legislation of Congress, which limits their power of alienating their allotments and reserves to the Secretary the authority to determine when certificates of competency may issue, lifting the restrictions upon their lands, and as further contained in the authorized rules and regulations promulgated by the Interior Department. This suit in equity for an injunction is proper and relief is justified when the facts are sufficient, as the relation of the Government toward incompetent members of this tribe holding restricted lands is one of trust, and furthermore it is requisite to avoid a multiplicity of cases for the same and like relief against continuing acts violative of the rights of the Indians to whom the Government owes protection. A final decree will be awarded against the defendants, enjoining them from procuring leases of lands not subject thereto without the approval of the Secretary of the Interior and from enclosing such lands and furnishing them to others for pasturage and grazing purposes,

46 in the cases where the leases are here held to be so unauthorized and in all other like cases. The costs of this suit will also be taxed to the defendants. In the cases wherein it is held that the leases are authorized, or the Government has no duty respecting the lands, an injunction will be denied.

The rulings of the court with reference to the allotments described in the original and supplemental statements of facts and other like allotments are as follows:

Paragraph 2. Surplus allotments of McComb children and homestead allotment of one of them, viz., Rachel B. McComb, all specified as being "minors under the age of 21 years," the leases being made by the father, Fletcher McComb, a white man, not a member of the tribe, and by the mother, Ellen McComb, a competent Osage. Also, surplus allotment of Hallie Reece, such "minor," the lease being made by the mother, Elizabeth Reece, a competent Osage, and by the

father, Dr. Hal Reeve, a white man, not a member of the tribe. Other leases were made of like character by parents who are competent Osages, or one of them a competent Osage and the other not a member of the tribe. As the allottees are presumed to be incompetent, all these leases must be held invalid, unless approved by the Secretary of the Interior, or what is equivalent, by Departmental Rules and Regulations, committing the privilege of leasing to one or both of the parents. The ground of this holding is that Section 7, Act June 28, 1906, 34 Stat. 539, while leaving the control, use and proceeds of the lands of minor members to the parents, provides that all leases for the benefit of individual members shall be subject to approval by the Secretary of the Interior. The leases cannot, therefore, have validity, without his sanction. Injunction granted.

Paragraph 3. Surplus allotments of Robert A. Lombard, Evart Chesewalla, and Andrew Pryor, all minors. Their fathers were members of the tribe and died some years ago. The leases were made by their mothers, who are white women and not members of the tribe. Presuming, as must be done that the allottees are incompetent, these and all similar leases are invalid, unless approved by the Secretary of the Interior, as provided by Section 7, Act June 28, 1906. Injunction granted.

Paragraph 4. Surplus allotments of Hiram Taylor, and of Wah-shah-hah-ne, deceased. The lease of the Taylor allotment was
47 made by his guardian, appointed by the County Court of Osage County, and the lease was approved by that court. The heirs of Wah-shah-hah-ne are Peter Kenworthy and others, all being incompetent. Partition of that land was had in the State district court, wherein Peter Kenworthy elected to take the land, and the sheriff made a deed to him, with the approval of the Secretary of the Interior. Peter Kenworthy is a minor, and Ed T. Kennedy is his guardian. The lease of the land was made by the guardian and approved by the County Court. The presumption is that both appointments of guardians by these courts of record were based on sufficient facts, in accordance with Section 3, Act April 18, 1912, 37 Stat. 86. The requirement of Section 7, Act June 28, 1906, that the lease be subject to approval by the Secretary of the Interior does not apply in such case. No ground is shown for resorting to this court, in the circumstances as that section authorized. Injunction denied.

Paragraph 5. Homestead allotment of Bessie Bruce, a competent Osage. The allottee can alienate the land only at the end of 25 years. Sections 4 and 7, Act June 28, 1906. Aaron vs. U. S., 204 Fed. 943. A lease is comprehended in alienation. Parker v. Riley, 243 Fed. 42. This lease is violative of said Act. Injunction granted.

Paragraph 6. Surplus allotment of Lena Bruce, an incompetent Osage. The lease is invalid, for the same reason as stated in paragraph 5.

Paragraph 7. Surplus allotments of Walter Harvey, deceased. He is presumed to have been incompetent. His heirs are his mother,

Mary Harvey, an incompetent Osage, and his father, Luther Harvey, a competent Osage. Luther Harvey's interest passed by foreclosure to R. C. Drummond, a white man, and not a member of the tribe. Luther Harvey was entitled to incumber his interest, under Section 6, Act April 18, 1912. Drummond and Mary Harvey executed the lease in question. Mary Harvey was not entitled to execute it without sanction of the Secretary of the Interior as the restriction under section 4, Act June 28, 1906, in such case adhered to the land after the allottee's death, and by fair interpretation it was meant to be continued as to incompetent heirs, under Section 6, Act April 18, 1912. Drummond had a right to lease his own interest only,
48 but none to lease the other 1–2 interest. Injunction against procurement of the lease in any way as to that interest.

Paragraph 8. Surplus allotment of Harold R. Hunt, deceased. He is presumed to have been incompetent. His heirs are Antwine Hunt, father, an incompetent Osage, and Hazel May Hunt, a white woman, and not a member of the tribe, these heirs taking equal interests. She conveyed her 1–2 interest to Joseph D. Mitchell, and that interest was bought by Antwine Hunt. The lease was made by Antwine Hunt. The mother's interest was not restricted. Levindale v. Coleman, 241 U. S., 432. It was subject to conveyance by her, and Antwine Hunt acquired an unrestricted title to that interest. His other interest remained however, restricted, under Sec. 4, Act June 28, 1906, and the lease is invalid as to that interest. Injunction granted, as under paragraph 7.

Paragraph 9. Surplus allotment of Cecilia Rogers, a minor. The lease was made by her parents both competent Osages. The lease required approval by the Secretary of the Interior, as provided by Sec. 7, Act June 28, 1906; and until recognized by the Department, it is invalid. Injunction granted.

Paragraph 10. Surplus allotment of Hun-kah, a minor. Lease was made by father, a competent member of the tribe. The mother is an incompetent member of the tribe. It is conceded that the Secretary of the Interior recognizes the right of the father to make the lease. But it requires Departmental approval. Injunction granted.

Paragraph 11. Surplus allotment of Tsa-pah-ke-ah. It is conceded that this lease complies with the rules and regulations of the Secretary of the Interior, and has his approval. It is valid, and the injunction will be denied.

Paragraph 12. Surplus allotment of Wy-u-hah-kah, deceased. His estate has been administered. His heirs are Han-ah-me-tsa-he, 1–3 interest, an incompetent Osage, Jennie Gray, 2–9 interest, a competent Osage, John Oberly, 2–9 interest, a competent Osage, Andrew Penn, deceased, 1–9 interest, an incompetent Osage, and Grace Morril, 1–9 interest, (presumed) incompetent. Andrew Penn died intestate. These lands are involved in a partition suit. The defendants have purchased the interests, 4–9, of Jennie Gray and John Oberly, obtaining a warranty deed therefor.

49 The Government is entitled to maintain the suit for the protection of the 1–3, or 3–9 interest of Hau-ah-me-tsa-he, as he is incompetent, and his restriction is not removed by Section 6, Act. April 18, 1912. The 4–9 interest of Jennie Gray and John Oberly, for like reason, have been lawfully conveyed to the defendants. The remaining 2–9 interests of the estate of Andrew Penn and Grace Morrill, are subject to protection by the Government. The title by partition of the Penn interest requires approval by the Secretary of the Interior, and without it, the lease is invalid as to that interest. Also a lease of the interest of Grace Morril is invalid. Injunction against the lease for said interests (2–9), of Andrew Penn estate and of Grace Morril, and the 1–3 of Hau-ah-me-tsa-he.

Paragraph 13. Surplus allotment of Wah-tsa-moie, deceased. His heirs are Martha Pryor, an incompetent Osage, Michael Wah-tsa-moie, an incompetent Osage, a minor, Harry Wah-tsa-Moie, deceased, a non-member of the tribe, each succeeding to a 1–3 interest. Harry Wah-tsa-moie lated died intestate, and his mother, Martha Pryor, as his heir took his 1–3 interest. The defendants have bought that interest, and obtained her deed therefor. She concurrs in the occupancy of the land by the defendants and payment to her for her portion. The interest of Harry Wah-tsa-moie passed to him without restriction, as he was not a member of the tribe, by the express terms of Section 6, Act April 18, 1912. Martha Pryor therefore took such title thereto, and by her conveyance, an unrestricted title thereto was acquired by the defendants. However, the interest inherited by her from the allottee, and the int-rst inherited from him by Michael Wah-tsa-moie, remain subject to restriction, under Section 4, Act June 28, 1906, and could not be leased, without the approval of the Secretary of the Interior. They do not appear to have been leased at all. The injunction will be granted against such 2–3 interest by the defendants.

Paragraph 14. Surplus allotments of Wah-hrah-lum-pah, et al. These lands have not been leased and are not being used by the defendants. No ground appears for an injunction. Denied.

Paragraph 15. Surplus allotment of the heirs of Wah-shah-me-tsa-he, who died intestate August 3, 1907, without
50 having made any selection of land. The heirs are Ho-ki-ah-se, an incompetent Osage, and Me-tsa-he, an incompetent Osage. They made the lease involved. The allotments are held to be valid. They are subject to restriction, under Section 4, Act June 28, 1906, and the leases on these and similar lands are invalid for want of approval by the Secretary of the Interior. Injunction granted.

Paragraph 16. Surplus allotment of Jack Wheeler, who died testate, May 16, 1916, and his will, approved by the Department of the Interior, is now pending probate. It devised to his wife, Nah-me-tsa-he, all his property, and contains no terms of restriction. She is an incompetent Osage. She made the lease involved. The holding of the court is that the effect of the will is to designate the suc-

cessors in lieu of those to whom the land would descend under the laws of this state, and when members of the tribe that the will did not remove the restrictions. However, the land is subject to administration in the County Court, under Section 3, Act April 18, 1912. If there were an administrator, he would be entitled to have the rents and profits, and to lease the land. It does not appear that any administrator has been appointed. Until his appointment, no lease by the devisee can be valid, and if appointed, still the aid of this court may be had, as a protection against dissipation or waste of the property, etc., under Section 3, Act April 18, 1912. Meantime an injunction is proper in this and other similar cases, effective only until and in event of a lease being made by an administrator.

Paragraph 17. Homestead allotment of the heirs of Walter Flore, who died intestate between January 1, 1906 and June 28, 1906. The sole heir at law is Kah-wah-e, an incompetent Osage allottee, who died leaving a will, approved by the Secretary of the Interior, heretofore admitted to probate, containing a restriction against alienation by devisees without the consent of the secretary of the Interior. Ke-ah-som-pah is sole devisee of the lands involved. She has sold and conveyed the land to a white man, who leased it to the defendants, without Departmental approval. The lease is invalid, because the land was restricted when allotted, and the devisee (presumed incompetent) was disabled to convey it. The power of the Secretary to determine whether a will shall be effective, under Section
51 8, Act April 18, 1912, includes the power to prescribe the terms, as to alienation. Injunction granted.

Paragraph 18. Surplus allotment of Jesse James. The lease to H. G. Ezell was approved by the Secretary of the Interior and is valid. The rental is paid, and there is no duty of the Government toward the allottee to protect the interests of Mr. Ezell. Injunction denied.

Paragraph 19. The facts are not stated in this paragraph from which it can be determined whether the leases were authorized or not. No injunction is warranted.

Oklahoma City, Oklahoma.

November 8, 1917.

JOHN H. COTTERAL,
Judge.

Endorsed: Filed in District Court November 8, 1917.

Decree.

Now, on this eighth day of November, 1917, this cause came on to be determined, the same being one of tthe regular juridicial days of the special October term of said Court, held at Oklahoma City, Oklahoma; the plaintiff appearing by John A. Fain, United States Attorney, and by Redmond S. Cole, Assistant United States Attor-

ey, and the defendants appearing by Leahy & Macdonald, their ttorneys; and upon consideration of the pleadings and the agreed tatements of fact, it was Ordered and Adjudged and Decreed as fol-ows:

That the plaintiff has the right and the duty to enforce its policy owards the Osage Indian in the matter of alienating and leasing heir lands, as contained in the legislation of Congress, which limits he power of the allottees to alienate their allotments, where the estrictions upon alienation have not been removed, in conformity vith the rules and regulations promulgated by the Secretary of the nterior, and further that this suit was properly brought for equit-ble relief.

The Court finds the defendants are leasing and taking leases of he allotments of minor members of the Osage Tribe of Indians, xecuted by the parents of said minors, in cases where one parent is a white person, and not a member of the Osage Tribe of ? Indians, and the other parent of the minor a member of the Osage tribe of Indians, to whom a certificate had been issued, nder the Act of Congress of June 28th, 1906; and that said leases re made without the approval of the Secretary of the Interior.

It is Ordered and Adjudged and Decreed that all such leases upon inor allottee's lands are invalid, unless approved by the Secretary f the Interior; and the defendants are hereby enjoined from leas-ng any lands of such kind and character, without the approval of he Secretary of the Interior, and from in any manner using or en-losing such lands, without the approval of the Secretary of the In-erior.

The Court further finds the defendants have leased the allotments f Robert A. Lombard, Evart Che-she-wal-la and Andrew Pryor, all inor members of the Osage Tribe of Indians, whose fathers are ead, the said leases having been executed by the mothers of said inors, who are all white women, and not members of the Osage ribe of Indians; and that said leases have not been approved by he Secretary of the Interior.

It is Ordered, Adjudged, and Decreed that said leases, and other ases upon lands of like kind and character are invalid, and the de-ndants are hereby enjoined from in any manner using or occupy-ng lands of this character, or leasing same, or enclosing same, with-ut the approval of the Secretary of the Interior.

The Court further finds the defendants have a lease upon the al-tment of Hiram Taylor, a minor Osage allottee; that said minor llottee has a guardian, who was appointed by the County Court of sage County, Oklahoma; that said lease was executed by the guard-an of said minor allottee, and duly approved by the County Court f Osage County, Oklahoma; that defendants have other leases exe-uted by guardians of like kind and character.

The Court finds that said leases are valid, without the approval of he Secretary of the Interior, and it is, therefore, ordered and ad-udged and decreed that an injunction upon this class of lands, be, nd the same is, hereby denied.

The Court further finds that the defendants have a lease upon the

homestead allotment of Bessie Bruce, a member of the Osage
53 Tribe of Indians, to whom a certificate of competency was issued under the Act of June 28th, 1906, which lease was executed by the allottee after the delivery of the said certificate of competency, and was not approved by the Secretary of the Interior, that said lease is an alienation of the premises, and is in violation of the Act of Congress above mentioned, and is invalid, without the approval of the Secretary of the Interior.

It Is, Therefore, ordered, adjudged and decreed that the defendants be, and they are hereby enjoined from leasing or occupying or using said homestead allotment of Bessie Bruce, without the approval of the Secretary of the Interior. The defendants are further enjoined from leasing, occupying or using any other homestead allotments of members of the Osage Tribe of Indians of like kind and character as the Bessie Bruce allotment, without the approval of the Secretary of the Interior.

The Court further finds the defendants have a lease upon the surplus allotments of Lena Bruce, a member of the Osage Tribe of Indians, and that said Lena Bruce has never received a certificate of competency.

It is ordered, adjudged and decreed that said lease is invalid, and the defendants are hereby enjoined from using said lands, or enclosing same, and from leasing said lands, or any other lands in Osage County of like kind and character, without the approval of the Secretary of the Interior.

The Court finds that the defendants have a lease on 160 acres of land allotted to Walter Harvey, deceased, a member of the Osage Tribe of Indians; that the heirs at law of Walter Harvey are Mary Harvey, his mother, an Osage Indian to whom a certificate of competency has not been issued, and his father, Luther Harvey, a member of the Osage Tribe of Indians, who has received a certificate of competency; that Luther Harvey mortgaged his one-half interest and the mortgage was foreclosed, and R. C. Drummond, a white man, and not a member of the Tribe, became the owner of an undivided one-half interest in said tract of land; that the said Luther Harvey had a right to alienate said one-half interest; that the lease held by the defendants is executed by Mary Harvey and R. C. Drummond, above mentioned, and was not approved by the Secretary of the Interior.

54 It is ordered, adjudged, and decreed that the lease on the undivided one-half interest of said land by Drummond to the defendants is valid; and that the lease to the defendants by Mary Harvey, on the other one-half interest, is invalid, without the approval of the Secretary of the Interior, and that the defendants be, and they are, hereby enjoined from leasing said undivided one-half interest of Mary Harvey, or in any manner dealing with said undivided one-half interest, without the approval of the Secretary of the Interior.

The Court further finds that the defendants have a lease upon the South Half of Section Twenty-eight (28), Township Twenty-seven, (27), Range Seven (7), in Osage County, Oklahoma, executed by

Antwine Hunt, as lessor; that the said land was allotted Harold R. Hunt, as a member of the Osage Tribe of Indians; that the said Harold R. Hunt died in infancy, leaving as his sole and only heirs at law, his father, Antwine Hunt, who has never received a certificate of competency, and Hazel May Hunt, his mother, a white woman, not a member of the Osage Tribe of Indians, that said heirs at law succeeded to the land equally; that said Hazel May Hunt conveyed by Warranty Deed, her interest to Joseph D. Mitchell, and the said Antwine Hunt purchased said undivided one-half interest from Joseph D. Mitchell, and is now the owner of the entire tract of land; that the undivided one-half interest of Hazel May Hunt was not restricted; that the said undivided one-half interest inherited by Antwine Hunt is restricted, and cannot be leased without the approval of the Secretary of the Interior.

It is ordered, adjudged, and decreed that the lease on the undivided one-half interest in said land which is restricted, as aforesaid, is invalid; and the defendants are hereby enjoined from leasing said restricted undivided one-half interest, without the approval of the Secretary of the Interior, or in any manner dealing with said undivided one-half interest, without the approval of the Secretary of the Interior, and that an injunction herein be denied as to the leasing or dealing with the other undivided one-half interest in said land.

The Court further finds that the defendants have a lease upon the allotment of Cecilia Rogers, a minor, a member of the Osage Tribe of Indians, ex-cuted by the father and mother of said minor; that the father and mother of said minor, prior to the execution of said lease, had both received certificates of competency, under the Act of June 28th, 1906; and that said lease has not been approved by the Secretary of the Interior.

It is ordered, adjudged and decreed that the defendants be, and they are hereby enjoined from occupying or using said lands, or in any manner dealing with said lands, or lands of like kind and character, without the approval of the Secretary of the Interior.

The Court further finds that the defendants have a lease on the lands allotted to Hun-kah, a minor, a member of the Osage Tribe of Indians, which lease is executed by the father of said minor; that the father has received a certificate of competency.

It is ordered, adjudged, and decreed that the defendants be, and they are hereby enjoined from occupying or using, or in any manner dealing with said lands, or with lands of like kind and character, without the approval of the Secretary of the Interior.

The Court finds that the defendants have a lease upon the lands allotted to Tsa-pah-ke-ah, which lease has been approved by the Secretary of the Interior.

It is ordered, adjudged, and decreed, that the said lease is valid and an injunction be, and the same is, hereby denied, as to said land.

The Court further finds that the defendants own an undivded four-ninths (4-9 interest in the lands described in the will as allotted to Wy-uh-ah-kah, deceased; that his estate has been administered in the County Court of Osage County, Oklahoma; that certain of his heirs at law were Hah-ah-me-tsa-he, who succeeded to an undivided

one-third (1-3) interest; Grace Morril, who succeeded to an undivided one-ninth (1-9) interest, and Andrew Penn, who succeeded to an undivided one-ninth (1-9) interest; none of whom ever received a certificate of competency, under the act of Congress of June 28th, 1906; that the decedent was a non-competent member of the Osage Tribe of Indians; that Jennie Gray and John Oberly, his other heirs at law, succeeded to an undivided four-ninths (4-9) interest in
56 said property, and prior to inheriting said lands, these parties had received certificates of competency; and subsequently conveyed the undivided four-ninths (4-9) interest to the defendants; that all of said lands are the subject of an action for the partition thereof, which action is pending in the District Court of Osage County, Oklahoma; that Andrew Penn is dead, and his estate is now being administered in the County Court of Osage County, Oklahoma; that the defendants are using said land, and are ready and willing to pay the other tenants in common their portion or share of the usable or rental value of the said lands.

It is ordered, adjudged, and decreed that the defendants own an undivided four-ninths (4-9) interest in said lands, and that the interest of the heirs at law, above set out, of the other five-ninths (5-9) interest, is restricted, and that the defendants be, and they are hereby enjoined from leasing said five-ninth's (5-9) restricted interest in said land, without the approval of the Secretary of the Interior, and are enjoined from occupying or using the premises, or any part thereof, without the approval of the Secretary of the Interior.

The Court further finds that certain lands mentioned in the will, were allotted to Wah-tsa-moie, a member of the Osage Tribe of Indians; that he died without having received a certificate of competency, leaving as his sole and only heirs at law, Martha Pryor and Michael Wah-tsa-moie, members of the Osage Tribe of Indians, neither of whom had received certificates of competency, and Harry Wah-tsa-moie, who was not enrolled as a member of the Osage Tribe of Indians each of said heirs at law succeeding to an undivided one-third (1-3) interest; that Harry Wah-tsa-moie died intestate, and his mother Martha Pryor succeeded to the undivided one-third (1-3) interest inherited by him from his father; that said Harry Wah-tsa-moie, being a non-member of the Tribe, under the Act of April 18th, 1912, the restrictions from said interest were removed; that the defendants bought said undivided one-third (1-3) interest which was unrestricted, and are the owners thereof; that they are occupying the land with the consent of Martha Pryor, who is an adult, the other heir, Michael Wah-tsa-moie, being a minor; that the defendants are able and willing to pay the portion of the usable value or the rental of said land due the other tenants in common;
57 that the Secretary of the Interior has not consented to the occupancy of said land by the defendants, and the defendants have no approved lease on the undivided two-thirds (2-3) interest in said land which was restricted.

It is ordered, adjudged and decreed that the defendants are the owners of an undivided one-third (1-3) interest in said lands, and that Martha Pryor and Michael Wah-tsa-moie are the owners of an undivided two-third's (2-3) interest in said lands, which two-third's (2-3) interest remains restricted, under Section 4 of the Act of June

28th, 1906; that the defendants and each of them, are hereby enjoined from in any manner occupying or using the said lands, or any portion thereof, or from enclosing same, or in any manner dealing with said lands, or any part thereof, without the consent of the Secretary of the Interior, or without procuring a lease upon the undivided one-third (1-3) interest which is restricted.

The Court further finds that the defendants are not using or dealing with the lands allotted to Wah-rah-lum-pah, mentioned in the bill, and are not leasing same, and no ground appears for an injunction, and it is therefore, denied.

The Court further finds that the defendants have a lease upon the East Half of the Southwest Quarter and the West Half of the Southeast Quarter of Section Ten (10) Township Twenty-eight (28), Range Seven (7), in Osage County, Oklahoma, which land was allotted to the heirs of Wah-shah-me-tsa-he, deceased, Osage Allottee, No. 770; that said allottee died intestate on August 3rd, 1907, and at the time of her death had not selected any land under the Allotment Act; that her sole and only heirs at law are Ho-ki-ah-se and Me-tsa-he, both adults and members of the Osage Tribe of Indians, and neither of said parties ever have received a certificate of competency; that said lease was executed by the said heirs, and was not approved by the Secretary of the Interior; that the defendants have other leases upon lands of similar character.

It is ordered, adjudged, and decreed that said lands are subject to the restrictions under Section 4 of the Act of June 28th, 1906, and that leases on said lands, and similar lands, are invalid, without the approval of the Secretary of the Interior, and that the defendants be, and they are, hereby enjoined from leasing or occupying, or
58 in any manner dealing with said lands, or any other lands of like kind and character, without the approval of the Secretary of the Interior.

The Court further finds that the defendants have a lease upon the Northeast Quarter of Section Fifteen (15) Township Twenty-eight (28) Range Six (6), in Osage County, Oklahoma, which land was allotted as surplus land to Jack Wheeler, Osage Allottee, number 728; that the said Jack Wheeler died testate on the 16th day of May, 1916, leaving a will, which has been legally admitted to probate by the County Court of Osage County, Oklahoma; that, under the will of said decedent, Nah-me-tsa-he acquired said land as devisee; that the said devisee is a member of the Osage Tribe of Indians, and has never received a certificate of competency; that she leased said lands to the defendants, and that said lease was not approved by the Secretary of the Interior.

The Court finds the land is subject to administration in the County Court of Osage County, Oklahoma, under Section 3 of the Act of April 18th, 1912, and to lease by the administrator, and that said administrator may collect the rents on said land, without the approval of the Secretary of the Interior, and that it does not appear herein that an administrator for said estate has been appointed.

It is ordered, adjudged and decreed that the effect of the said will was to designate the successors, in lieu of those to whom the land would otherwise descend, under the laws of the State of Oklahoma, that the will of Jack Wheeler did not remove the restrictions thereon,

and the said Nah-me-tsa-he, took said lands subject to all the restrictions against alienation, as provided for in the Act of June 28th, 1906, and that the defendants, and each of them, be and they are hereby enjoined from using or occupying or leasing, or in any manner dealing with said lands, or lands of similar character, in Osage County, Oklahoma, without the approval of the Secretary of the Interior.

The Court further finds that the defendants have a lease upon the Northeast Quarter of Section Nine (9) Township Twenty-five (25) Range Seven (7) in Osage County, Oklahoma, allotteed to the heirs of Walter Florer, deceased, the lease being executed by a white man, not a member of the Osage Tribe of Indians, to whom Ke-ah-
som-pah, the devisee named in the will of Kah-wah-e, had
59 conveyed said land by Warranty Deed; that this land was allotted to the heirs of Walter Florer, deceased, under the Act of Congress, approved June 28th, 1906, and Walter Florer was enrolled as a member of the Osage Tribe of Indians, and died intestate between January first, 1906, and June 28th, 1906, leaving as his sole and only heir at law, Kah-wah-e; that neither Walter Florer, Kah-wah-e nor Ke-ah-som-pah ever received a certificate of competency, under the above Act of Congress; that Kah-wah-e died, leaving a will, which was duly approved by the Secretary of the Interior, and which will, by the 15th Paragraph thereof, provides:

"All devises of real estate made hereunder, are made subject to the condition that the real estate shall not be encumbered or alienated, without the consent of the Secretary of the Interior."

that neither the Deed nor the lease above mentioned were approved by the Secretary of the Interior.

It is ordered, adjudged, and decreed that under the Act of June 28th, 1906, the lands allotted to the heirs of Walter Florer, deceased, were restricted, and said heirs took the lands subject to the restrictions against alienation, the same as if the land had been selected by Walter Florer, and allotted to him during his lifetime; that said conveyance and said lease are invalid, and of no force and effect without the approval of the Secretary of the Interior, and that the defendants, and each of them, be, and they are, hereby enjoined from using, conveying, enclosing or leasing the land above mentioned, or any other land of like kind or character, without the approval of the Secretary of the Interior.

The Court further finds the lands mentioned in the Bill as allotted to Jesse James, are leased to H. G. Ezell, under the Departmental rules and regulations, which lease is approved by the Secretary of the Interior, and is valid, and that the rental due on said lease is paid.

It is Therefore ordered, adjudged, and decreed, that there is no duty imposed upon the plaintiff to protect the interests of said Ezell, as lessee, and plaintiff is without authority to maintain this suit for injunction, so far as this land is concerned, that an injunction herein be, and the same is hereby denied, as to said land.
60 It is further ordered, adjudged, and decreed that the defenants and each of them, and their agents and employees,

be, and they are hereby, enjoined from leasing for grazing and agricultural purposes, either directly or indirectly, in their own names or in the name of other persons, firms or corporations, and from dealing in leases on, using, occupying and enclosing for themselves or for others, any of the lands described in this decree as restricted lands, and all other lands in Osage County, Oklahoma, of like status and character, allotted to members of the Osage Tribe of Indians in Oklahoma, without the approval of the Secretary of the Interior.

It is further ordered, adjudged and decreed that the costs of this action be taxed against the defendants.

To said Decree of the Court, and every part thereof wherein the defendants, or either of them, are enjoined, the defendants, and each of them, except, and pray the Court for an appeal from said Decree to the Circuit Court of Appeals.

To which Decree, in refusing to grant plaintiff an injunction, as prayed for, the plaintiff excepts.

It is further ordered that the appeal be, and the same, is, hereby granted to the defendants, upon the giving by them jointly of a bond, conditioned as provided by law, in the sum of Five Hundred Dollars.

JOHN H. COTTERAL,
District Judge.

O. K.
REDMOND S. COLE,
Assistant U. S. Attorney.

O. K.
LEAHY & MACDONALD.

Endorsed: Filed in District Court November 8, 1917.

Motion to Substitute Copy for Lost File.

Now come the defendants and show the court that the original petition for an appeal filed by the defendants, with the order allowing same, endorsed thereon, has been lost. That an exact copy of said petition and order is hereto attached.

61 Wherefore, the defendants pray the court for an order directing the clerk to file said copy in lieu of the original, so that the same may be incorporated in the Transcript.

C. S. MACDONALD,
T. J. LEAHY,
Attorneys for Defendants.

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

Redmond S. Cole, Assistant United States Attorney, of lawful age being duly sworn on his oath says that he has read the above and foregoing motion; that he knows of his own personal knowl-

edge that the original petition for appeal filed in this court by the defendants, with the order of the court endorsed thereon allowing same, has been lost and that the copy attached thereto is a full, true and correct copy of the same.

REDMOND S. COLE.

Subscribed and sworn to before me this 10th day of January, 1918.

[SEAL.] M. V. HAWS,
Deputy Clerk of the United States District Court for the Western District of Oklahoma.

Petition for Appeal.

To the Honorable John H. Cotteral, United States Judge for the Western District of Oklahoma:

The above named defendants, and each of them, feeling themselves aggrieved by the Decree made and entered in the above entitled cause, on the 8th day of November, 1917, do hereby appeal from said Order and Decree to the United States Circuit Court of Appeals, for the reasons specified in the assignment of errors, which is filed with the Clerk of this Court, and which is herewith submitted; and pray that their appeal be allowed, and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers, upon which said Decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit; and your petitioners further pray
62 that the proper Order, touching the security to be required of them, to perfect their appeal, be made.

T. J. LEAHY,
C. S. MACDONALD,
Solicitors.

The foregoing prayer, for an appeal, is hereby granted, and appeal allowed, upon giving bond, conditioned as required by law, in the sum of Five Hundred Dollars, this 21st day of November, 1917, said bond to be effective as to costs, but not as to stay of the injunction granted.

JOHN H. COTTERAL,
Judge of the U. S. District Court for the Western District of Oklahoma.

Filed Nov. 21, 1917. Arnold C. Dolde, Clerk by Frank T. McCoy, Deputy.

Endorsed: Filed in District Court January 10, 1918.

Order, Jan. 10, 1918. Leave to Substitute Copy of Petition for Appeal in Lieu of Lost File.

Now on this 10th day of January, 1918, comes the defendants by Leahy & McDonald, their attorneys, and show to the court that the petition for appeal herein was mislaid or lost in the office of the United States Attorney for this district, and move the court for an order directing the clerk of said court to file a copy of said petition for appeal attached to this motion in lieu of the original petition for appeal, and the court being fully advised in the premises, it is ordered that the clerk of said court file said said copy of petition for appeal in lieu of the original petition for appeal.

Assignment of Error.

Now, on this 21st day of November, 1917, came the above named defendants, by their solicitors, T. J. Leahy and C. S. Macdonald, and say:

That the Decree made and entered in the above entitled cause on the 8th day of November, 1917, against the defendants and in favor of the plaintiff, is erroneous and unjust to the defendants, for the following reasons:

First. The Court erred in not sustaining the motion of the defendants to dismiss the Bill of Complaint of the plaintiff.

Second. The Court erred in rendering a final Decree against the defendants, and in favor of the plaintiff, and in holding and decreeing that leases made by the parents of minor Osage allottees, where one parent is a white person, and not a member of the Tribe, and the other parent holds a certificate of competency, are invalid unless approved by the Secretary of the Interior; and in enjoining the defendants from occupying or leasing such land, without the approval of the Secretary of the Interior.

Third. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, and in holding and decreeing that the leases held by the defendants upon lands allotted to minor members of the Osage Tribe of Indians, which leases were executed by the mothers of said minors, the mothers being white persons, and non-members of the Tribe, and the fathers of said minors being dead, were invalid, without the approval of the Secretary of the Interior, and the Court erred in granting an injunction in such cases.

Fourth. The Court erred in rendering a final Decree against the defendants, enjoining them from leasing homestead allotments of members of the Osage Tribe of Indians, where such member has received a certificate of competency.

Fifth. The Court erred in rendering final Decree against the defendants and in favor of the plaintiff, and in granting an injunction against the defendants, enjoining them from dealing with the lands allotted to Walter Harvey, upon which the defendants have

a lease from the white person owning an undivided one-half interest therein, and a non-competent Indian owning the other undivided one-half interest; and the Court erred in enjoining the defendants from in any manner dealing with the restricted undivided one-half interest, without the approval of the Secretary of the Interior.

Sixth. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, enjoining the de-
64 fendants from in any manner dealing with the undivided one-half interest, without the approval of the Secretary of the Interior, of the South Half of Section Twenty-eight (28), Township Twenty-seven (27), Range Seven (7), which land was owned by Antwine Hunt, an undivided one-half interest of which is alienable without the approval of the Secretary of the Interior, and an undivided one-half interest of which is inalienable, without the approval of the Secretary of the Interior.

Seventh. The Court erred in rendering a final Decree against the defendants, and in favor of the plaintiff, and in holding and decreeing that the lands allotted minor Osage Indians could not be leased by the parents of such minors, where the parents have been issued certificates of competency, without the approval of the Secretary of the Interior.

Eighth. The Court erred in rendering final Decree against the defendants and in favor of the plaintiff, enjoining the defendants from occupying, or using or leasing, without the consent of the Secretary of the Interior, the lands allotted Hun-kah, a minor member of the Osage Tribe of Indians, where the father of said minor has a certificate of competency, and executes the lease without the approval of the Secretary of the Interior, and the mother is a non-competent member of the Osage Tribe of Indians, and does not join in said lease.

Ninth. The Court erred in rendering final Decree against the defendants and in favor of the plaintiff, and in holding and decreeing that the lands allotted to Wy-n-hah-kah, a non-competent member of the Osage Tribe of Indians, who died leaving competent and non-competent heirs at law, were restricted lands, and the defendants, who were the owners of an undivided four-ninth's interest in said lands, could not use or occupy said lands, without the consent and approval of the Secretary of the Interior; and the Court erred in holding that the plaintiff could maintain this action, when the said lands were the subject of a suit pending in the District Court of Osage County, Oklahoma, for a partition thereof; and erred in holding that the defendants, who were tenants in common with non-competent members of the Osage Tribe of Indians, could not lease, or occupy, or use said premises, without the consent of the Secretary of the Interior, or without an approved lease upon the restricted
65 interest of said tenants in common.

Tenth. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, and in holding that the plaintiff might maintain this suit against the defendants, who were the

owners of an undivided one-third interest in the lands allotted to Wah-tea-moie, deceased, a non-competent member of the Osage Tribe of Indians, and erred in holding that the defendants, who were the owners of an undivided one-third interest, could not occupy or use said premises, without the consent of the Secretary of the Interior, or without obtaining an approved lease upon the other undivided two-third's interest, which is owned by non-competent members of the Osage Tribe of Indians.

Eleventh. The Court erred in rende-ing final Decree against the defendants and in favor of the plaintiff, enjoining the defendants from occupying, using or leasing without the approval of the Secretary of the Interior, the East Half of the Southwest Quarter, and the West Half of the Southeast Quarter of Section Ten (10), Township Twenty-eight (28), Range Seven (7), in Osage County, Oklahoma, which land was allotted to the heirs of Wah-shah-me-tsa-he, deceased Osage Allottee No. 707, and erred in holding that said lands were restricted, and that the heirs at law of said decedent, who are non-competent members of the Osage Tribe of Indians, could not lease said lands without the approval of the Secretary of the Interior; and the Court erred in holding that the restrictions against alienation, under the Act approved June 28th, 1906, were applicable to other than living members of the Osage Tribe of Indians, who had elected lands under said Act.

Twelfth. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, enjoining the defendants from using, or occupying, and in holding the lease of the defendants invalid on the Northeast Quarter of Section Fifteen (15), Township Twenty-eight (28), Range Six (6), in Osage County, Oklahoma, without the consent of the Secretary of the Interior, or the approval of such lease by the Secretary of the Interior; and erred in holding that the will of Jack Wheeler, which was approved by the Secretary of the Interior, was not a removal of restrictions upon said
98 lands; and erred in holding that the devisee under said will, took said lands subject to the restrictions under the Act of Congress of June 28th, 1906, against alienation; and erred in holding that the effect of a will is to designate the successors, in lieu of those to whom the land would descend under the laws of descent and distribution, applicable to the Osage Tribe of Indians, and that the devisee in said will being a non-competent member of the Osage Tribe of Indians, acquired said land subject to the inhibition against alienation, in the same manner as a non-competent heir at law would succeed to said land.

Thirteenth. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, enjoining the defendant from occupying or using, or in any manner dealing with the Northeast Quarter of Section Nine (9), Township Twenty-five (25), Range Seven (7), in Osage County, Oklahoma, without the consent or approval of the Secretary of the Interior; and erred in holding that the plaintiff had any authority to maintain this suit; and erred in holding that lands allotted to heirs of deceased member of the Osage

Tribe of Indians were in any manner restricted, or that the heirs at law were restricted from alienating said land; and erred in holding that the restrictions against alienation, expressed in the Act of June 28th, 1906, applied to such lands; and erred in construing the Act of Congress of June 28th, 1906, to impose restrictions upon lands allotted to deceased members of the Tribe; and the Court further erred in holding that the will of Kah-wah-e, which was duly approved by the Secretary of the Interior, was not a removal of restrictions; and in holding that the Secretary of the Interior had authority, under the Act of Congress of April 18th, 1912, to prescribe terms, or require the testator to incorporate a clause in the will, prohibiting the devisee from alienating said lands; and the Court erred in holding that the clause in the will of Kah-wah-e had the legal effect of preventing the devisee from legally conveying her interest in said property, so devised; and erred in holding that the said clause 15, in the said will was of any force or effect, whatever.

Fourteenth. The Decree is contrary to both law and equity.

67 Wherefore, The defendants pray that the said Decree be reversed, and the District Court be directed to dismiss the complaint, and the defendants have all other relief which to the Court may seem equitable, just and proper, the premises considered.

T. J. LEAHY,
C. S. MACDONALD,
Solicitors for the Defendants.

Endorsed: Filed in the District Court Nov. 21, 1917.

Appeal Bond.

Know all men by these presents:

That we, George G. La Motte and Anna Marx La Motte, as principals, and A. N. Ruble and H. H. Brenner, as sureties, are held and firmly bound unto The United States of America in the full and just sum of Five Hundred Dollars, to be paid to the said The United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators or assigns, jointly and severally by these presents.

Sealed with our seals, and dated this 17th day of November, 1917.

Whereas, lately at the special October, 1917, term of the District Court of The United States for the Western District of Oklahoma, in a suit pending in said Court, between The United States of America, plaintiff, and George G. and Anna Marx La Motte, defendants, decree was rendered against the said defendants, and the said defendants, George G. and Anna Marx La Motte, have obtained an appeal of the said Court, to reverse the decree in the aforesaid suit, and a citation to the said The United States of America, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, sixty days from and after the date of this citation.

Now, the condition of the above obligation is such, that if the

said George G. and Anna Marx La Motte shall prosecute said appeal to effect, and answer all costs if they, or either of them, fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

68 Sealed and delivered in the presence of Charles S. Macdonald.

GEO. G. LA MOTTE.
ANN MARX LA MOTTE. [SEAL.]
A. N. RUBLE. [SEAL.]
H. H. BRENNER. [SEAL.]

Signed in the presence of, and acknowledged before me this 17 day of November, 1917.

B. F. MASON,
[SEAL.] *Notary Public.*

My Commission Expires Jan. 29, 1920.

Approved by
JOHN H. COTTERAL.
District Judge.

Endorsed: Filed in District Court Nov. 21, 1917.

Stipulation Concerning Election and Designation of Records.

It is stipulated and agreed by the parties to this appeal that the Transcript of Record on appeal in the above numbered case shall be printed under the supervision of the clerk of the U. S. District Court and shall include:

1. The bill with the exhibits thereto attached.
2. Motion to dismiss.
3. Decree of the Court denying the motion to dismiss the bill.
4. The answer of the defendants.
5. Condensed statement of the evidence as allowed and filed herein.
6. Memorandum of rulings as basis for final decree.
7. Final decree.
8. Petition for appeal and order allowing same.
9. Citation and acceptance.
10. Assignment of Errors.

69 11. This election and designation.

It is understood that this stipulation as to the record shall supersede all præcipes filed for transcripts.

T. J. LEAHY,
C. S. MACDONALD,
Attorneys for Appellant.
REDMOND S. COLE,
Assistant United States Attorney and Attorney for Appellee.

Endorsed: Filed in District Court Jan. 10, 1918.

Order Enlarging Time to Lodge Record in Appellate Court.

On this 15 day of January, 1918, upon application of the above named defendants, due cause appearing, it is ordered that the time within which the record in the above entitled cause may be lodged in the United States Circuit Court of Appeals for the Eighth Circuit be, and the same is hereby enlarged and extended 20 days from January 20th, 1918. JOHN H. COTTERAL,
District Judge.

Endorsed: No. 215. United States vs. George G. La Motte, et al. Order enlarging time to lodge record in appellate court.

Filed Jan. 15, 1918, Arnold C. Dolde, Clerk By M. V. Haws, Deputy.

70 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA,
Western District of Oklahoma:

I, Arnold C. Dolde, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the above and foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in said court, in case No. 215, In Equity, wherein The United States of America, is plaintiff, and George G. La Motte and Anna Marx La Motte, are defendants, as full, true and complete as the said transcript purports to contain and as called for by the designation and stipulation of the record above set forth.

I further certify that the original citation is hereto attached and returned herewith.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at office in the City of Guthrie, in said District, this 22nd day of January, A. D., 1918.

ARNOLD C. DOLDE, *Clerk,*
By M. V. HAWS, *Deputy Clerk.*

[Seal of the United States District Court, Western District of Oklahoma.]

Filed Feb. 8, 1918, E. E. Koch, Clerk.

71 (*Transcript on Appeal by United States.*)

(Citation and Acceptance of Service.)

The United States of America to George G. La Motte and Anna Marx La Motte, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the District Court of the United States for the Western District of Oklahoma, wherein United States of America is appellant and you are appellees to show cause, if any there be, why the decree rendered against the said United States of America as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable John H. Cotteral Judge of the District Court of the United States for the Western District of Oklahoma this 15 day of March A. D. 1918.

JOHN H. COTTERAL,
Judge of the District Court of the United States for the Western District of Oklahoma.

Due and personal service of the within citation is hereby accepted and acknowledged on behalf of the Defendants herein this 19th day of March, A. D. 1918.

T. J. LEAHY,
C. S. MACDONALD,
Attorney for Defendants:

Endorsed: Filed in the District Court on March 21, 1918.

(*Stiplation as to Transcript of Record.*)

In the District Court of the United States for the Western District of Oklahoma.

215

In Equity.

UNITED STATES, Plaintiff,

vs.

GEORGE G. LA MOTTE and ANNA MARX LA MOTTE, Defendants.

It is stipulated and agreed by and between the parties hereto, the United States, plaintiff, and George G. La Motte and
72 Anna Marx La Motte, defendants, that in the preparatiion of the printed transcript of record for an appeal herein on behalf

of the United States the said transcript shall contain only such pleadings and other matters of record as pertain to the appeal of the United States and which are not included in the printed transcript of record for appeal now lodged in the Circuit Court of Appeals for the Eighth Circuit by the defendants herein in the case of George G. La Motte and Anna Marx La Motte vs. United States, No. 5099;

It is further stipulated and agreed that the transcript of record on file on the appeal in said case No. 5099 may be used for the purpose of the appeal herein by the United States;

It is further stipulated and agreed that the Clerk of the Circuit Court of Appeals for the Eighth Circuit shall assign both appeals herein for hearing on the same day.

REDMOND S. COLE,
Assistant United State Attorney, Attorney for Plaintiff.
T. J. LEAHY,
C. S. MACDONALD,
Attorneys for Defendants.

Endorsed: Filed in the District Court on March 21, 1918.

(Petition for and Order Allowing Appeal.)

To the Honorable John H. Cotteral, Judge of the District Court of The United States for the Western District of Oklahoma:

The above named plaintiff, feeling itself aggrieved by the decree made and entered in the above entitled cause on the 8th day of November, 1917, does hereby appeal from said order and decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in Assignment of Errors, which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

REDMOND S. COLE,
Assistant United States Attorney,
Attorney for Plaintiff.

73 The foregoing prayer for an appeal is hereby granted, and appeal allowed.

This 15th day of March, 1918.

JOHN H. COTTERAL,
Judge of the United States District Court for the Western District of Oklahoma.

Endorsed: Filed in the District Court on March 15, 1918.

Assignment of Errors.

Now, on this 15th day of March, 1918, comes the plaintiff, by Redmond S. Cole, Assistant United States Attorney, and says:

That the decree made and entered in the above entitled cause, on the 8th day of November, 1917, wherein the Court denied certain relief prayed for by the plaintiff, is erroneous and unjust to the plaintiff, for the following reasons:

1. That the Court erred in finding that agricultural and grazing leases executed on the lands allotted to minor members of the Osage Tribe of Indians in Oklahoma, by guardians appointed by the County Court of Osage County, Oklahoma, were valid without the approval of the Secretary of the Interior, and in denying the application of the plaintiff for an injunction restraining the defendants from taking leases on such lands without submitting the same to the Secretary of the Interior for his approval.

2. That the Court erred in finding that the Government was without authority to maintain a suit for injunction to restrain the defendants from leasing and grazing lands allotted to Jesse James and leased to H. G. Ezell, and in denying the application of the plaintiff for an injunction restraining the defendants from taking leases on such lands or grazing the same without first having obtained a lease from the allottee and having the same approved by the Secretary of the Interior.

Wherefore, the plaintiff prays that said decree, insofar as it denied the relief sought by the plaintiff, be reversed, and that the District Court be directed to enter a decree enjoining the defendants, and each of them, from in any manner dealing with leases on the lands of minor members of the Osage Tribe of Indians, without first having said leases prepared, submitted to, and approved by the Secretary of the Interior; and that the Court be directed to enter a decree enjoining the defendants and each of them, from in any manner leasing or grazing, or exercising any control over the lands mentioned in the bill as allotted to Jesse James, and leased to H. G. Ezell, and from leasing or attempting to lease, or grazing without leases other lands in Osage County of like status and character, allotted to members of the Osage Tribe of Indians in Oklahoma, without the approval of the Secretary of the Interior.

74

REDMOND S. COLE
Assistant United States Attorney,
Attorney for Plaintiff.

Endorsed: Filed in the District Court on March 15, 1918.

(*Præcipe for and Election as to Printing Transcript.*)

To the Honorable Arnold C. Dolde, Clerk of said Court:

You will please prepare a supplemental transcript of record on appeal in the above numbered cause, and include therein the following papers:

1. Stipulation concerning supplemental transcript for appeal;

2. Petition for appeal on behalf of the United States, and the order allowing same;

3. Assignment of Error by the United States;

4. Citation and service thereof;

5. Præcipe for transcript and designation of the record.

The appellant, United States, elects to have said record printed under the supervision and direction of the Clerk of the United States Circuit Court of Appeals of the Eighth Circuit, and hereby requests an estimate of the costs and deposits demanded.

REDMOND S. COLE,
Assistant United States Attorney.

Endorsed: Filed in the District Court on March 21, 1918.

75 (*Clerk's Certificate to Transcript.*)

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Arnold C. Dolde, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the attached and foregoing to be a full, true and complete supplemental transcript of the pleadings, record and proceedings in said court, in case No. 215, In Equity, wherein the United States of America, is plaintiff, and George G. La Motte and Anna Marx La Motte, are defendants as full, true and complete as the said transcript purports to contain and as called for by the præcipe for supplemental transcript and designation of the record above set forth.

I further certify that the original citation is hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Guthrie in said District, this 22nd day of March, A. D. 1918.

[Seal U. S. Dist. Court West. Dist. of Oklahoma.]

ARNOLD C. DOLDE,
Clerk.

By M. V. HAWS,
Deputy Clerk.

Filed Mar. 25, 1918. E. E. Koch, Clerk.

76 And thereafter the following proceedings were had in said causes, in the Circuit Court of Appeals, viz:

(*Appearance of Counsel for Appellants in Case No. 5099.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5099.

GEORGE G. LA MOTTE et al., Appellants,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Appellants.
C. S. MACDONALD.
T. J. LEAHY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 8, 1918.

(*Appearance of Counsel for Appellee in Case No. 5099.*)

The Clerk will enter my appearance as Counsel for the Appellee.
JOHN A. FAIN,
United States Attorney.

(Endorsed:) Filed in U. S. Court Court of Appeals, Feb. 25, 1918.

(*Appearance of Counsel for Appellant in Case No. 5129.*)

No. 5129.

UNITED STATES OF AMERICA, Appellant,
vs.
GEORGE G. LA MOTTE et al.

The clerk will enter my appearance as Counsel for the Appellant.
JOHN A. FAIN,
U. S. Att'y.
REDMOND S. COLE,
Asst. U. S. Att'y.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 30, 1918.

(*Appearance of Counsel for Appellees in Case No. 5129.*)

The Clerk will enter my appearance as Counsel for the Appellees.
T. J. LEAHY,
C. S. MACDONALD,
Pawhuska, Okla.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 3, 1918.

(*Stipulation that Cases May be Briefed and Submitted Together as One Case in the U. S. Circuit Court of Appeals.*)

No. 5099.

GEORGE G. LA MOTTE and ANNA MARX LA MOTTE, Appellants,

vs.

THE UNITED STATES OF AMERICA, Appellee.

78 No. 5129.

THE UNITED STATES OF AMERICA, Appellant,

vs.

GEORGE G. LA MOTTE and ANNA MARX LA MOTTE, Appellees.

It is hereby stipulated and agreed by and between the above named appellants and appellees that the above named causes, pending in this court, upon appeals from the decision from the United States District Court for The Western District of Oklahoma, and the case of the United States of America, plaintiff, vs. George G. and Anna Marx La Motte, defendants, wherein the court granted in part and denied in part the relief prayed for by the plaintiff. It is agreed that said causes should be consolidated in this court, and briefed as one cause.

It is therefore, stipulated by and between the parties, that agreeable to the court, the above named causes may be consolidated and briefed, argue dand submitted together as one case.

REDMOND S. COLE,
Attorney for U. S.
T. J. LEAHY,
C. S. MACDONALD,
Attorney for La Motte & La Motte.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 29, 1918.

79 (*Order of Submission.*)

September Term, 1918.

Thursday, September 5, 1918.

These causes, being an appeal and cross-appeal, having been called for hearing in their regular order and counsel not being present to make oral argument for either of the parties, the same are thereupon taken by the Court as submitted on the transcript of the record from said District Court and the briefs of counsel filed herein.

80 *Opinion.*

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1918.

No. 5099.

GEORGE LA MOTTE et al., Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the Western District of Oklahoma.

No. 5129.—December Term, A. D. 1918.

UNITED STATES OF AMERICA, Appellant,

vs.

GEORGE G. LA MOTTE et al., Appellees.

Appeal from the District Court of the United States for the Western District of Oklahoma.

Mr. T. J. Leahy and Mr. C. S. MacDonald submitted brief for George G. La Motte et al.

Mr. John A. Fain, United States Attorney, and Mr. Redmond S. Cole, Assistant United States Attorney, submitted brief for United States.

Before Carland and Stone, Circuit Judges, and Elliott, District Judge.

STONE, Circuit Judge, delivered the opinion of the Court:

81 Cross appeals from an injunction bill brought by the Government against George G. and Anna Marx La Motte. The purpose of the bill as revealed in the prayer was to prevent the La Mottes from

"entering into any lease, of any kind or character, with any incompetent Osage Indian, and by any means or manner, other than that prescribed by the Secretary of the Interior; and that they be further restrained and enjoined from using, occupying, and exercising any control, and from assigning and sub-leasing any lands informally leased or acquired, as aforesaid, from any incompetent Osage Indian member of the Osage Tribe of Indians in Oklahoma, without first having complied with the rules and regulations of the Secretary of the Interior;"

The basis of the bill was (*a*) that the La Mottes were dealing and intended to continue to deal in agricultural leases of lands of incompetent Osage Indians without securing the approval of such leases or sub-leases by the Secretary of the Interior and without complying with the rules and regulations of the Secretary concerning such leases; (*b*) that in so doing and in placing their customers upon such lands they were interfering with and preventing the proper leasing of the lands by the Secretary in accordance with such rules and regulations; (*c*) that the placing of such customers upon these lands gave rise to numerous trespasses on such lands and also upon other land enclosed within the fencing of the lands so attempted to be controlled by them; (*d*) that it would require a multitude of suits by the Government to prevent such trespasses and clear these lands of such intruders.

The modus operandi of the La Mottes is described as follows:

"That the defendants are pretending to be engaged in the business of leasing Osage Indian lands for the use of various and numerous persons, firms and corporations to graze cattle thereon, and for agricultural purposes;

"That the manner and means of procuring leases for use as aforesaid is, in substance, as follows: that the said defendants will solicit various incompetent Osage Indians to execute a lease upon lands allotted to them, which said leases are not in the form prescribed by the Secretary of the Interior, but are informal, in that they
82 do not comply with the provisions of Exhibit 'A' [form of lease required by the Department];

"That the defendants will continue to procure as many leases from as many allottees within a certain prescribed area until said defendants have, under the guise of said leases, obtained in their own name, or in the name of the person whom they represent, a body of land which they cause to be enclosed with fence, and denominate the same a 'pasture'; that his 'pasture' is then leased, or sub-leased, or contracted, to the person, firm or corporation desiring the use of the same to graze cattle thereon and for agricultural purposes; that the said defendants charge said persons, firms or corporations, a large sum of money, and place said persons, firms or corporations, in possession of said land, and thereafter said lands are used by said persons, firms or corporations, for grazing purposes and for agricultural purposes, the said defendants guaranteeing to said persons, firms or corporations that they will pay all trespass money and all rentals, and that the defendants will assume all liability to the said persons, firms or corporations, that may be occasioned by the use and occupancy of the said lands as aforesaid;

"That it is not the intention, nor the custom of said defendants to have said leases, so procured from said incompetent Osage Indians signed, subscribed and sworn to before an officer of the Osage Indian Agency; neither is it the intention nor the custom to submit such leases to the Secretary of the Interior for his consent and approval but, that, on the contrary, immediately after the procurement of said leases as aforesaid, the said defendants, for a sum stated, proceed to place the person, firm or corporation [designing] to use the said land, in possession.

"The plaintiff alleges that the defendants have, by the aforesaid manner and means, acquired informal leases from incompetent Osage Indians to the amount of approximately twenty-five thousand acres of land, the exact number of which the plaintiff is unable to ascertain, but alleges that it is informed and believes that the number of acres so acquired will far exceed the amount of twenty-five thousand acres.

"The plaintiff alleges that, for a number of years past, the defendants have procured, by the manner and means aforesaid, 82 'pastures' for H. M. Stoudenaker, T. P. Kyger, Lee Russell, Brown & Ellingwood, a partnership, R. H. Chowing, Thompson & Shipman, a partnership, Ross Heaton, and divers other persons, and have placed said persons and firms in possession, and have used and occupied lands belonging to incompetent Osage Indian allottees, for agricultural purposes and for grazing cattle, without complying with the rules and regulations of the Secretary of the Interior, as above set out, and without the knowledge or consent of the Secretary of the Interior; and that the defendants have established themselves in a permanent business conducted in the aforesaid manner, and are at the present time procuring, and will continue to procure, leases as aforesaid, for persons, firms and corporations for the aforesaid purposes."

The bill also particularizes as to twenty-six described pieces of property so treated by them.

The answer admits the leasing of "lands in Osage County from Osage Indians and other people for grazing and agricultural purposes." It further says that it leases large bodies of land for grazing purposes adjacent to lands belonging to non-competent Osage Indians and "that in order to lease their own lands * * * * to cattle men who desire and demand large acreage; it is necessary for them to agree with such cattle men that they will protect and guarantee them from damages by reason of trespass upon such Indian lands. These defendants deny that they take possession of such lands or that they deliver possession to their own lessee of the same, but merely hold themselves liable for any trespass money that may be due on account of stock running upon the same." The answer then deals with the specifically described tracts raising various questions concerning the authority of the Secretary over grazing and agricultural leases on Osage Indian lands in the different instances here illustrated. The answer concludes with a prayer:

"that the court declare and decree that these defendants may, without any violation of any authorized rules and regulations of the Secretary of the Interior, lease lands from the parents of minor Osages; also lands which are under the control of guardians and administrators duly appointed by the County Court of Osage County, Oklahoma and lands which are inherited by members of the 84 tribe from deceased members of the tribe, even though such members do [not?] have certificates of competency, without conforming to the rules and regulations of the Secretary of the Interior concerning the leasing of Osage Indian lands and that the court decree that the Secretary of the Interior has no authority

under the law to promulgate rules and regulations concerning the leasing of lands of any of the members of the Osage tribe of Indians and define and determine the authority of the Secretary of the Interior concerning the approval of farming and grazing leases of lands belonging to members of said tribe."

The decree of the court found that the following kinds of leases were invalid without the approval of the Secretary, towit, of land of minor allottee by parents one of whom was a white non-member of the tribe; of land of minor allottee by surviving parent, a white non-member of the tribe; of land of minor allottee by parent after both of them had received certificates of competency under the Act of June 28, 1906; of land of minor allottee by father after receipt by him of such certificate of competency; of homestead allotment by competent Indian after receipt of certificate of competency under the above statute; of surplus allotment of non-competent adult; by such heirs of land allotted to non-competent adult heirs (deceased dying intestate August 3, 1907, before selection of land); of surplus land, by non-competent devisee; by a white non-member of the tribe who was grantee under warranty deed from devisee of sole heir of land allotted to said heir as heir of Indian dying before June 28, 1906 (deceased, heir and devisee all being non-competents and devisee receiving under will approved by Secretary providing "All devises of real estate made hereunder are made subject to the condition that the real estate shall not be encumbered or alienated, without the consent of the Secretary of the Interior"). It found to be valid, leases executed by a guardian duly appointed by the County Court, such leases being duly approved by the County Court, on lands of minor allottees; and declared a certain lease would have been valid had it been made by a duly appointed administrator of surplus land allotted to decedent. As to certain lands held in common the decree found as follows: (1) that where the lease was upon land inherited from allottee by his father, to whom a certificate of competency had been issued, and

by his mother, to whom no such certificate had been issued,

85 and the father thereafter had lost his interest through foreclosure of a mortgage placed by him thereon and the purchaser thereunder and the mother had executed a lease that the lease was valid as to the interest of the purchaser and void as to that of the mother; (2) that where the land of an infant allottee descended to his father, a non-competent, and to his mother, a white non-member of the tribe, and the father acquire by purchase the mother's interest from her grantee, and subsequently leased the entire land, the lease was valid as to the interest coming through the mother and invalid as to that descending to the father; (3) that where lands descended from a non-competent allottee to five heirs, three of whom were non-competent (one having since died and his estate being in administration) and two had received competency certificates before the inheritance; and the estate had been administered and partition proceedings in progress; and the competent heirs had conveyed their interests to appellants; that appellants were enjoined from leasing the interest of the non-competents or "from occupying or using the

premises, or any part thereof, without the approval of the Secretary of the Interior"; (4) that where land descended from a non-competent allottee to three heirs two of which are non-competent and one a non-member of the tribe (lacking enrollment, though apparently a son) and thereafter through the death of the latter his interest descends to one of the other of the above two heirs, his mother, and she sold this latter interest to appellants who occupy and use the land with her consent, the other heir being a minor; that appellants are the owners of the one-third interest purchased but are enjoined from "in any manner occupying or using the said lands, or any portion thereof, or from enclosing same, or in any manner dealing with said lands, or any part thereof, without the consent of the Secretary of the Interior, or without procuring a lease upon the undivided one-third [two-thirds?] interest which is restricted." The decree also found that there was no duty on the part of the Government to protect from trespass, not injurious to the freehold, land leased in accordance with the rules and regulations of the Secretary of the Interior and upon which the lessee was paying the rental due. This was an instance of such land being adjacent to or surrounded by land belonging to appellants which had all been inclosed as a large pasture by an outside fence with no fence between this leased land and that of appellants. The trespass being by grazing cattle. The court denied a motion to dismiss the bill for defect in parties (in that the non-competent Osage Indians were the real and sole parties in interest,) and for lack of equity (in that no grounds for injunctive relief were stated and the existence of an adequate remedy at law by ejectment).

The various assignments of error cover all of the instances presented by the above statement. In their entirety they present for determination the broad questions of the powers and duties generally of the Government in the protection of Osage Indian allottees and land owners and their lessees respecting agricultural and grazing leases and, in particular, the powers and duties of the Secretary of the Interior in that regard.

In dealing with tribal Indians in respect to severalty lands the United States has dual sources of authority. In the first place it may, as owner of the fee, impose such conditions as it sees fit in a grant to the Indian. In the second place it may, as the guardian of a people in a state of pupilage, impose such restrictions as seem advisable for the protection and welfare of such wards in the enjoyment or ownership of their land. The exercise of this latter authority in no way depends upon the former but may operate where the land has passed from all restrictions of the grant. Brader v. James, 246 U. S. 88; Tiger v. Western Inv. Co., 221 U. S. 286.

As to instances of control through the grant of the lands it is established law (as stated in 14 R. C. L. 131) that:

"In making allotments of tribal lands the federal government has undoubted power to attach conditions to the grant, and it has exercised this power for the purpose of conserving the interests of the Indians by safeguarding the individual ownership of allottees through suitable restrictions designed to secure them in their pos-

session and to prevent their exploitation, such, for example, as a prohibition against alienation for a specified period, or a requirement that an executive officer of the government shall assent to the execution of a conveyance."

Where the land is allotted in fee with no restrictive reservation, or where under the terms of the treaty or statute the land after restricted allotment passes from under the restriction, its ownership becomes unincumbered so far as governmental supervision ex-
87 tends, unless the allottee, or subsequent holder, is an Indian whose acts in respect to any land, or that character of land, are under governmental guardianship and as such controlled by law.

The Osage Indians are recognized as maintaining a tribal organization and their powers as to alienation of lands held in severalty are governed by the provisions of the Osage Allotment Act of June 28, 1906, (34 Stat. 539). As presented in this court and as found by the trial court the subsequent Act of April 18, 1912, [37 Stat. 86] concerned only two of the tracts of land here involved. In those two instances the Act of 1912 did not affect the result reached by the trial court because one (the Wah-tsa moie allotment) was a minor in common and the other (Ge Jack Wheeler allotment) was land subject to administration but as to which there had never been any administration. Therefore the controversy is controlled by the Allotment Act of 1906 and what is herein stated refers to that Act unincumbered by later legislation. No opinion is ventured as to the effect of later legislation. That Act provided (Secs. 2, 3 and 4) for the allotment of lands to the members of the tribe, subject to reservation to the tribe of all mineral rights therein for 25 years; the allotments to be divided into homestead and surplus lands; the homesteads to be inalienable until further Congressional action, and the surplus lands inalienable for 25 years, except that the Secretary of the Interior might grant to adults certificates of competency empowering them to convey their surplus lands and, after 25 years or the death of such allottees, their homesteads. As it would be impossible for such competent Indian to convey by deed after death that part of the provision must be taken to mean testamentary disposition. It further provided (Sec. 5) that at the expiration of 25 years "the lands, * * * shall be the absolute property of the individual members of the Osage tribe, * * * or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, * * * and said members shall have full control of said lands, * * * except as hereinbefore provided." It then designated (Sec. 6) the law to govern the descent of such lands. Section 7 provides for the use and control of such lands during the restriction period above designated as follows:

"That the lands herein provided for are set aside for the sole use
and benefit of the individual members of the tribe entitled
88 thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full

control of the same, including the proceeds thereof: Provided, That parents of minor members of the tribe shall have the control and use of said minor's lands, together with the proceeds of the same, until said minors arrive at their majority: And provided further, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

Section 12 is, "That all thing necessary to carry into effect the provisions of this Act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior."

The purpose and policy of this Act regarding these lands is clearly expressed. The mineral wealth is reserved for 25 years to the tribe under the strict control and protection of the Secretary, the proceeds thereof to be held in trust by him and distributed to the tribal members or their heirs. The surface is "set aside for the sole use and benefit of the individual members of the tribe, entitled thereto, or to their heirs" for twenty-five years from January 1, 1907. They are not to be diverted from this "use" by encumbrance or alienation except as to surplus lands of adults whom the Secretary has investigated and certified as competent to protect themselves in that regard, and except as to homesteads of such competent Indians which may be devised by them. To secure the full "benefit" to such Indians and their heirs they are permitted to fully control such lands for "farming, grazing or any other purpose not otherwise specifically provided for" in the Act and to control the proceeds from such usage. They may accomplish this through leases but, to prevent overreaching by lessees and the consequent partial or total destruction of the beneficial use designed by the Act, the approval of such leases by the Secretary is required. The only exception to this last statement is in the case of those holding certificates of competency from the Secretary where it is provided that such persons "shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States."

9 Applying this definition of the statute to the various sets of facts determined in the decree of the trial court there results the following: the approval of the Secretary is required to leases of lands held by minors or other non-competents whether the land covered thereby came to such through allotment, descent or devise provided the land was allotted under the above statute. The circumstance that such lease was arranged by a parent, guardian or administrator who might or might not be a non-member of the tribe or a member competent to manage his own affairs or that the lease may have been approved by the State County Court is of no consequence because the statute specifically requires the protection afforded by the approval of the Secretary. The above application applies to all of such sets of facts except those of a lease by a competent allottee of his surplus lands or homestead and of leases by competents or non-members of the tribe who were tenants in common with non-competents. As to the former the statute provides that the

homestead can not be alienated but it seems clear that such competent Indian, through the "right to manage, control and dispose of his or her lands the same as any citizen of the United States," expressly given by the statute, can make such leases without the approval of the Secretary.

As to instances where the land is held by tenants in common, part of whom are non-competent and part competent or non-members of the tribe a more perplexing situation is presented. Each of such tenants is, under the ordinary rules of tenancy in common, entitled to ingress, egress and possession of the land and to a proper share of the benefits from the usage of the land. Such rights may be transferred by those legally capable of acting for themselves in such matters. But these considerations must bow to the requirements of the statute. Tenancy in common does not change a non-competent into a competent Indian nor in any wise increase the power of such to deal with his interest in land so held. On the other hand to permit the competent tenant to lease or use the entire tract or any undivided portion thereof, even though he accounted to the non-competent tenant for his just portion, would completely obliterate that protection of supervision and approval which the statute carefully lodges in the Secretary alone. Therefore, the conclusion seems necessary that no lease of any part or interest in Osage Indian
90 land held in common where one or more of such tenants in common are non-competents can be made without the approval of the Secretary. Only through such a conclusion can the protection required by the statute be preserved. Apparent injustice to the competent or non-member tenant can not prevail against the statute and such result is easily avoidable through the definite separation of land among the tenants through partition in accordance with the provisions of the Act of 1912, Section Six. 37 Stat. 86.

Another situation is presented by some of the above sets of facts and requires notice. That is where allotted lands have come through descent, devise or purchase to non-competents from or through competents or non-members of the tribe. The provisions of Section 2, Paragraph Seven give full power of alienation of surplus lands to competents and make such subject to taxation. The homestead of such is made inalienable and non-taxable for twenty-five years "or during the life of the homestead allottee." These provisions show the legislative intention that all restrictions are removed from the surplus lands and, after 25 years or the death of the allottee, from the homestead. In short, that such restrictions do not follow the land into whosoever hands it may pass. But this determination is not conclusive of the right of alienation or leasing by a non-competent Osage Indian who may succeed to or acquire the title to such land. As stated earlier in this opinion the Government, through its power and duty of wardship over a people in a state of pupilage, may protect them in the disposition of allotted lands coming to them without restriction. Such were the cases of Brader v. James, 246 U. S. 88 and Tiger v. Western Investment Co., 221 U. S. 286. The question is, therefore, has the Government retained its control over the disposition by non-competent Osage Indians of Osage lands no

matter from what source those lands came to such non-competent? If such control is retained it must be found in the Act now under consideration. The Act contemplates the continuation of the tribal government; the supervision of the valuable mineral rights (retained in the tribe) by the Government for 25 years; the holding in trust by the Government of tribal funds for 25 years; the absolute inalienability by non-competents for 25 years of surplus lands and of homesteads until further provision by law; the specific requirement that "all leases given on said lands for the benefit of
91 the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior;" the setting aside of these lands "for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided." In the Brader and Tiger cases, the Act of April 26, 1906 (34 Stat. 137), which dealt broadly with the Five Civilized Tribes, was reviewed. Both that and the Osage Allotment Act were passed by the same session of Congress. The Supreme Court in those cases determined that the provisions of that law showed a Congressional intention to retain control over the disposition of lands by the class of Indians there involved. A comparison of those provisions, as discussed and construed in those opinions, with the provisions of the Act here in question shows a similarity as to many of them and, in our judgment, a stronger situation here where there is dissimilarity. We, therefore, conclude that Congress intended to and did in this Act retain for 25 years such control over the Osage lands of non-competent Osage Indians from whatever source they were derived.

Another question is whether the Secretary has authority under this Act to prescribe and enforce Rules and Regulations and Forms of Leases respecting the leasing of lands of non-competents. We read the requirement that such leases "shall be subject only to the approval of the Secretary of the Interior" to mean that they are valid only when approved by him. The Secretary acts in such matters as the protector of the Indians' welfare. He can withhold such approval for any reason that seems to him meritorious. These lands comprise many thousands of acres. It was to be expected, as has proved true, that upon so much land and over a period of 25 years there would be many hundreds of these leases presented for his approval. It would seem the most natural procedure for the Secretary to work out and make public the general requirements he deemed necessary for the protection of such Indians and, therefore, for the procurement of his approval. Such would be a great saving to him in the convenient and speedy performance of his duties in this respect and a like saving of delay and uncertainty to those desiring to procure such leases. In fact, such a procedure would seem a necessity to the proper performance by him of such a trust. This action is expressly authorized by Section 12 which is: "That
92 all things necessary to carry into effect the provisions of this Act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior."

There remains for our consideration the determination of the trial court that the Government was without authority to maintain an injunction to restrain the La Mottes from leasing or grazing land leased by the allottee to H. G. Ezell. The facts are that Ezell is the valid lessee under the approval of the Secretary; that he has paid the full consideration therein required to the allottee; that the La Mottes have not attempted to lease such premises; that their lessees of other adjacent lands owned or controlled by them permit cattle to pass on and graze the unfenced leasehold held by Ezell. Such trespass does not injure the freehold nor affect the allottee lessor. The wrong is to Ezell alone and he has a legal remedy and he alone. The Government is not concerned in and has no authority to protect such interest of Ezell.

There is a clear ground of equitable interference by the Government stated in the bill in that leases made contrary to the statute cast clouds upon the title which the Government holds in trust for the Indians.

The order is that the decree be modified in accordance with the terms of this opinion and as thus modified affirmed. The costs in the court below to be assessed against the La Mottes.

Filed January 30, 1919.

93 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1918.

Thursday, January 30, 1919.

No. 5099.

GEORGE G. LA MOTTE and ANNA MARX LA MOTTE, Appellants,

vs.

UNITED STATES OF AMERICA.

No. 5129.

UNITED STATES OF AMERICA, Appellant,

vs.

GEORGE G. LA MOTTE and ANNA MARX LA MOTTE.

Appeals from the District Court of the United States for the Western District of Oklahoma.

These causes came on to be heard on the transcripts of the records from the District Court of the United States for the Western District of Oklahoma, and were argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in

these causes, be, and the same is hereby, modified in accordance with the terms of the opinion of this Court, and that as thus modified the decree of the said District Court in these causes be, and the same is hereby, affirmed without costs to either party in this Court; the costs in the said District Court to be assessed against the Defendants, George G. La Motte and Anna Marx La Motte.

January 30, 1919.

94 *(Petition of George G. La Motte et al, for Appeal to Supreme Court, U. S. and Allowance Thereof.)*

Come now George G. La Motte and Anna Marx La Motte, appellants in the above entitled cause No. 5099, and appellees in the above entitled cause No. 5129, and represent and show that they appealed from a decree of the United States District Court for the Western District of Oklahoma, and brought up the entire record in the case of George G. La Motte, et al., Appellants, vs. United States of America, the same being No. 5099, and that a cross-appeal was filed and allowed by and on behalf of the United States of America, Appellant, vs. George G. La Motte, et al., the same being No. 5129, above mentioned; that but one decree was rendered in the Court below and both appeals grow out of the same case, and a stipulation was entered into and filed by which it was agreed that the record in case No. 5129 should contain only such pleadings and other matter of record as pertained to the appeal of the United States and which was not included in the printed transcript of the record for appeal at the time lodged in the United States Circuit Court of Appeals for the Eighth Circuit in case No. 5099 above mentioned.

It is further represented that on April 29, 1918, a stipulation was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit by which it was agreed that the above mentioned appeals should be consolidated and briefed as one case, and in accordance therewith the Court heard the cross-appeal in case No. 5129 together with the appeal in case No. 5099, and said appeals were so treated by the Court, and on the 30th day of January, 1919, of the December Term, 1918, said Court rendered and entered a decree and judgment affirming in part the judgment of the United States District Court for the Western District of Oklahoma, and reversing and modifying same in part.

Your petitioners, George G. La Motte and Anna Marx La Motte, appellants in case No. 5099 and appellees in case No. 5129, feeling aggrieved by the above mentioned decree so rendered and en-
95 tered by this Court on January 30, 1919, do hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the entire record, proceedings and documents in both of the cases above mentioned, to wit: George G. La Motte, et al., Appellants, vs. United States of America, No. 5099, and United States of America, Appellant, vs. George G. La Motte, et al., No. 5129, upon which the decree and judgment of

this Court was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, D. C., under the rules of such court in such cases made and provided, and your petitioners further pray that the proper order relating to the security required of them be made.

T. J. LEAHY,
C. S. MACDONALD,
Attorneys for Appellants, George G. La Motte and Anna Marx La Motte.

Appeal allowed upon giving bond required by law in the sum of $2000.00.

KIMBROUGH STONE,
Circuit Judge.

Approved April 19, 1919.

KIMBROUGH STONE,
Circuit Judge.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 21, 1919.

(Assignment of Errors of George G. La Motte et al. on Appeal to Supreme Court U. S.)

Come now George G. and Anna Marx La Motte by their solicitors T. J. Leahy, Esq., and C. S. Macdonald, Esq., and say that the decree rendered and entered in the above entitled causes on the 30th
96 day of January, 1919, against the appellants, George G. and Anna Marx La Motte, and in favor of the United States of America, is erroneous and unjust to them for the following reasons:

First. The Court erred in modifying the judgment of the United States District Court for the Western District of Oklahoma in favor of appellants, by which judgment the lower court held that a lease upon minor Osage allottee lands made by a duly appointed qualified guardian and approved by the County Court was valid without the approval of the Secretary of the Interior, and in holding that such lease required the approval of the Secretary of the Interior.

Second. The Court erred in affirming the judgment of the United States District Court for the Western District of Oklahoma in favor of the appellee and against the appellants.

Third. The Court erred in not reversing the decree of the United States District Court for the Western District of Oklahoma restraining the defendants from leasing lands as described in the decree.

Fourth. The Court erred in holding that there was a clear ground for equitable interference by the Government under the allegations of the bill.

Fifth. The Court erred in modifying the decree of the lower Court and affirming the decree of the lower court as modified, and in holding and decreeing that leases made by a guardian duly appointed by the County Court of Osage County, Oklahoma, and said leases being approved by said Court, were invalid without the approval of the Secretary of the Interior.

Sixth. The Court erred in holding that the Osage Allotment Act of June 28, 1906 (34 Statutes at Large, page 539), governed and controlled the questions at issue in this cause and that the Act of April 18, 1912 (37 Statutes at Large, Page 86), did not affect the questions at issue and was not controlled as to the guardianship cases in question and as to the questions upon lands acquired under will duly approved by the Secretary of the Interior under the provisions of the Act of April 18, 1912.

Seventh. The Court erred in not holding in favor of appellants and in decreeing that leases made by the parents of Osage minor allottees where one parent is a white person and not a member of the tribe and the other parent a member of the tribe and having a certificate of competency are invalid unless approved by the Secretary of the Interior and in affirming the judgment of the lower court enjoining the appellants from occupying or leasing such lands without such approval.

Eighth. The Court erred in affirming the decree of the lower Court against appellants and holding that the lease held by appellants upon lands allotted to minor members of the Osage Tribe of Indians, which leases were executed by the mothers of said members, the mothers being white persons and non-members of the tribe, and the fathers of said members being dead, were invalid, without the approval of the Secretary of the Interior, and erred in granting an injunction in said cause.

Ninth. The Court erred in affirming the judgment of the lower court in enjoining the defendants from dealing with lands allotted to Walter Harvey upon which the appellants have a lease from a white person owning an undivided one-half interest therein and a non-competent Indian owning the other one-half interest, which lease was not approved by the Secretary of the Interior, and erred in holding that appellants could not use any part of said lands.

Tenth. The Court erred in affirming the decree of the lower Court against the appellants and in favor of appellee enjoining appellants from in any manner dealing with or occupying any portion of the lands in which appellants own undivided interest without a lease duly approved by the Secretary of the Interior from their tenants in common who were non-competent Indians.

Eleventh. The Court erred in affirming the judgment of the lower court enjoining the appellants from occupying or in any manner dealing with their undivided interest in lands allotted to a non-competent member of the Osage Tribe of Indians where such member died leaving competent and non-competent heirs at law, the appel-

lants having purchased the interest of the competent heirs, the same
being a four-ninths interest in said lands, and which land was
98 the subject of a petition suit pending in the District Court of
Osage County, Oklahoma, at the time the injunction was
granted, and erred in holding that the appellants could not in any
manner deal with any interest in said lands by way of using or leasing
their interest without a lease approved by the Secretary of the Interior.

Twelfth. The Court erred in affirming the decree of the lower
Court in holding against the appellants and in favor of appellee in
enjoining appellants from using or occupying the Northeast Quar-
ter of Section Fifteen (15), Township Twenty-eight (28), Range
Six (6), in Osage County, Oklahoma, and in holding the lease of
the appellants invalid on said land without the approval of the Sec-
retary of the Interior, and erred in affirming the lower court and in
holding that the will of Jack Wheeler, which will was duly approved
by the Secretary of the Interior and filed for probate, was not a re-
moval of restrictions upon the alienation of the lands, and erred in
holding that the United States had any interest in said lands which
would warrant appellee in maintaining the suit, and erred in affirm-
ing the judgment of the lower court and holding that the devisee
under said will, she being a non-competent member of the Osage
Tribe of Indians acquired said lands subject to the restrictions pro-
vided for in the Act of Congress of June 28, 1906, against the
alienation and that said devisee could not deal with said lands or
alienate same without the approval of the Secretary of the Interior.

Thirteenth. The Court erred in affirming the decree of the lower
court against the appellants and in favor of appellee, enjoining the
appellants from occupying or using, or in any manner dealing with
Northeast Quarter of Section Nine (9), Township Twenty-five (25),
Range Seven (7), described in the bill without the consent or ap-
proval of the Secretary of the Interior, and erred in holding that the
United States had any authority or interest in said lands sufficient
to maintain this suit, and erred in holding that lands allotted to the
heirs of deceased members of the Osage Tribe of Indians were in
any manner restricted or that the heirs at law could not alienate such
lands without the approval of the Secretary of the Interior, and erred
in holding that the restrictions against alienation under the Act of
Congress approved June 28, 1906 (34 Statutes at Large, page 539)
applied to such lands and the Court further erred in affirming
99 the decree of the lower court in holding that the will of Kah-
wah-e, which will was duly approved by the Secretary of the
Interior and duly probated in the County Court of Osage County,
Oklahoma, and the estate administered upon under the Act of Con-
gress of June 28, 1912 (37 Statutes at Large, page 36), by the terms
of which will and by the judgment of the County Court of Osage
County, Oklahoma, the lessor of the above described lands acquired
same was not a removal of restriction, and that the lessor of said
lands could not deal with same without the approval of the Secre-
tary of the Interior, and that a lease by the devisee of said land
under said will to the appellants was void unless approved by the

Secretary of the interior; that under the Act of Congress approved April 18, 1912 (37 Statutes at Large, page 36), the Secretary had authority to prescribe terms or require the testator to incorporate a clause in the will prohibiting the devisee from alienating said lands, and erred in holding that the clause in said will had the legal effect of preventing the devisee from legally conveying their interest in said property, as devised, without the approval of the Secretary of the Interior, and erred in holding that the clause in said will No. 15 was of any force or effect whatever.

Fourteenth. The Court erred in holding that the Government has retained control over all lands allotted under the Act of Congress approved June 28, 1906 (34 Statutes at Large, page 539), and in holding that a non-competent member of the Osage Tribe of Indians cannot deal with, dispose of or alienate any lands allotted under said Act of Congress no matter from what source those lands come to such non-competent member without the approval of the Secretary of the Interior, and the Court erred in holding that the controversy is controlled by the said Act of Congress and not by the Act of Congress of April 18, 1912 (37 Statutes at Large, page 86), and the Court erred in holding that the restrictions were not upon the lands but upon the person and that a non-competent Indian acquiring unrestricted lands by will could not lease said unrestricted lands without the approval of the Secretary of the Interior.

Fifteenth. The judgment and decree is both contrary to law and equity.

100 Wherefore, appellants pray that said decree be reversed and that said United States Circuit Court of Appeals for the Eighth Circuit be ordered to enter a decree reversing the decision of the lower court in said cause.

T. J. LEAHY,
C. S. MACDONALD,
Attorneys for Appellees, George G. La Motte and Anna Marx La Motte.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr 21, 1919.

Affidavit as to Amount in Controversy.

STATE OF MISSOURI,
City of St. Louis, ss:

C. S. Macdonald, of lawful age, upon being duly sworn on oath duly says that he is and was at the time of the institution of the above entitled suit one of the atorneys for George G. and Anna Marx La Motte, that the said parties have leases upon the lands in question covered by the decree in the above entitled causes and have paid out a large amount of money for said leases; and that the amount involved in this litigation at this time and at the time of

the institution of said suit in the District Court exceeds the sum of $1,000.00, and at all times sinces this litigation was instituted the same involved much more than the sum of $1,000.00.

C. S. MACDONALD.

Subscribed and sworn to before me this eighteenth day of April, A. D. 1919.

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Apr. 21, 1919.

101 *(Bond of George G. La Motte et al. on Appeal to Supreme Court U. S. in Case No. 5099.)*

No. 5099.

GEORGE G. and ANNA MARX LA MOTTE, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Know all men by these presents:

That we, George G. La Motte and Anna Marx La Motte, as principals, and A. N. Ruble and H. H. Brenner, as sureties, are firmly bound unto the United States of America in the full and just sum of Two Thousand Dollars, ($2,000.00), to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators or assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this 19th day of April, 1919.

Whereas, lately at the December, 1918 Term of the United States Circuit Court of Appeals, for the Eighth Circuit, in a suit pending in said Court between George G. La Motte and Anna Marx La Motte, appellants, and the United States of America, appellee, a decree was rendered against the appellants, and the said George G. La Motte and Anna Marx La Motte have obtained an appeal of the Court to reverse the decree in the aforesaid suit, and a citation to the United States of America, citing and admonishing it to be and appear in the Supreme Court of the United States, at the City of Washington, D. C., thirty days after the date of this citation.

Now the condition of the above obligation is such, that if the said George G. and Anna Marx La Motte shall prosecute said appeal to effect, and answer all costs, if they, or either of them fail to make

ged their plea, then the above obligation to be void, else to remain in full force and virtue.

GEORGE G. LA MOTTE.
ANNA MARX LA MOTTE.
H. H. BRENNER.
A. N. RUBLE.

102 Sealed and delivered in the presence of
TIMOTHY J. LEAHY AND
CHARLES S. MACDONALD.

Signed in the presence of, and acknowledged before me this 19th day of April, 1919.

[SEAL.] MINNIE McLAUGHLIN,
Notary Public.

My commission expires Oct. 31st, 1921.

Approved April 19, 1919.

KIMBROUGH STONE,
Circuit Judge.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Apr. 21, 1919.

(Bond of George G. LaMotte et al. on Appeal to Supreme Court U. S. in Case No. 5129.)

No. 5129.

UNITED STATES OF AMERICA, Appellee,

vs.

GEORGE G. and ANNA MARX LA MOTTE, Appellants,

Know all men by these presents:

That we, George G. La Motte and Anna Marx La Motte, as principals and A. N. Ruble and H. H. Brenner, as sureties, are firmly bound unto the United States of America in the full and just sum of Two Thousand — ($2,000.00), to be paid to the said the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, or
103 assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this 19th day of April, 1919.

Whereas, lately, at the December, 1918 Term of the United States Circuit Court of Appeals, for the Eighth Circuit, in a suit pending in said Court between the United States of America, appellant, and George G. and Anna Marx La Motte appellees, a decree was rendered against the appellees, and the said George G. La Motte and Anna Marx La Motte have obtained an appeal of the Court to reverse the decree in the aforesaid suit, and a citation to the United States of

America, citing and admonishing it to be and appear in the Supreme Court of the United States, at the City of Washington, D. C., thirty days after the date of this citation.

Now the condition of the above obligation is such, that if the said George G. La Motte and Anna Marx Lamotte shall prosecute said appeal to effect, and answer all costs, if they, or either of them fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

GEORGE G. LA MOTTE.
ANNA MARX LA MOTTE.
H. H. BRENNER.
A. N. RUBLE.

Sealed and delivered in the presence of
TIMOTHY J. LEAHY AND
CHARLES S. MACDONALD.

Signed in the presence of and acknowledged before me this 19th day of April, 1919.

[SEAL.] MINNIE McLAUGHLIN,
Notary Public.

My commission expires Oct. 31, 1921.

Approved April 19, 1919.

KIMBROUGH STONE.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Apr. 21, 1919.

104 *(Precipe for Transcript on Appeal to Supreme Court U. S.)*

To the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit:

You will please include in the transcript on appeal in the above entitled causes, the following parts of the record.

1st. The entire records on appeal and cross appeal from the United States District Court for the Western District of Oklahoma to the United States Circuit Court of Appeals for the Eighth Circuit.

2nd. Appearances of Counsel.

3rd. Stipulation that the two cases may be briefed and submitted as one case.

3a. Order of Submission.

4th. Opinion of the United States Circuit Court of Appeals for the Eighth Circuit.

5th. Decree of the United States Circuit Court of Appeals for the Eighth Circuit.

6th. Petition for appeal to Supreme Court, U. S., and allowance thereof.

7th. Assignment of Errors on Appeal to Supreme Court, U. S.

7a. Affidavit as to amount involved in suit.

8th. Bonds on appeal to Supreme Court, U. S.

9th. Citation on appeal to Supreme Court U. S., with proof of service.

10th. Appellants' praecipe of records for Supreme Court, with proof of service.

T. J. LEAHY,
C. S. MACDONALD,
Attorneys for George G. La Motte et al.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Apr 2, 1919.

[65] United States Circuit Court of Appeals, Eighth Circuit.

No. 5088.

GEORGE G. LA MOTTE et al., Appellants,

vs.

UNITED STATES OF AMERICA,

Appeal from the District Court of the United States for the Western District of Oklahoma.

No. 5129.

UNITED STATES OF AMERICA, Appellant,

vs.

GEORGE G. LA MOTTE et al.

Appeal from the District Court of the United States for the Western District of Oklahoma.

Citation.

UNITED STATES OF AMERICA:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from and after the date hereof, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit

Court of Appeals for the Eighth Circuit, wherein George G. La Motte and Anna Mary La Motte are Appellants and you are Appellee, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Kimbrough Stone, United States Circuit Judge in and for the Eighth Circuit, this 19 day of April, A. D. 1919.

KIMBROUGH STONE,
United States Circuit Judge for the Eighth Circuit.

Complete legal service of the within citation on appeal together with precipe, by delivery to me at Oklahoma City, Oklahoma, on this day, of a true, full and perfect copy thereof, is hereby accepted.

Dated at Oklahoma City, this 24th day of April, 1919.

JOHN A. FAIN,
U. S. District Attorney in and for the Western Federal District of Oklahoma, and Attorney for the United States of America in the Above-entitled Case.

[Endorsed:]

U. S. Circuit Court of Appeals, Eighth Circuit.

No. 5089.

George G. La Motte et al.

vs.

United States of America.

No. 5129.

United States of America, Appellant.

vs.

George G. La Motte et al.

Citation on Appeal to Supreme Court, U. S., and Acceptance of Service.

Filed May 19, 1919. E. E. Koch, Clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United

States for the Western District of Oklahoma, as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, in the case of George G. La Motte, et al., Appellants, vs. The United States of America, No. 5099, and the transcript of record from the District Court of the United States for the Western District of Oklahoma, as prepared and printed, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, in the case of the United States of America, Appellant, vs. George G. La Motte, et al., No. 5129, and also full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, prepared in accordance with the praecipe of George G. La Motte, et al., except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of service is hereto attached and herewith returned.

I do further certify that on the second day of April, A. D. 1919, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Western District of Oklahoma.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Paul, Minnesota, this Twenty-first day of May, A. D. 1919.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover:

File No. 27155. U. S. Circuit Court Appeals, 8th Circuit. Term No. 400. George G. La Motte and Anna Marx La Motte, appellants, vs. The United States of America. Filed June 3, 1919. File No 27155.

In the Supreme Court of the United States

No. [redacted]121

GEORGE G. LAMOTTE, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS.

T. J. LEAHY,
C. S. MACDONALD,
Counsel for Appellants.

HARLOW PUBLISHING COMPANY Oklahoma City

In the Supreme Court of the United States

No. 400

GEORGE G. LaMOTTE, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT.

This is an action brought by the United States in the United States District Court for the Western District of Oklahoma against George G. LaMotte and Anna Marx LaMotte enjoining them from entering into any lease of any kind or character with any noncompetent Osage Indian, or by any means or manner other than that prescribed by that of the Secretary of the Interior, and from occupying and exercising any control, and from assigning and sub-leasing any lands formerly leased or acquired from any non-competent Osage Indian, member of the Osage Tribe of Indians in Oklahoma, without first having

complied with the rules and regulations of the Secretary of the Interior. The Circuit Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court and the appellants in said Circuit Court appeal to this Court. LaMotte and LaMotte are referred to as appellants, and the United States as appellee herein.

Authority is claimed for this proceeding under the Act of Congress of June 28, 1906, commonly known as the Osage Allotment Act, and the acts supplementary to and amendatory thereof, it being contended by the appellee that said acts imposed upon it the duty of supervising and controlling the leasing of lands for grazing and agricultural purposes belonging to noncompetent Osage Indians, who are members of the Osage Tribe of Indians in Oklahoma. The appellee contends that under said acts of Congress the Secretary has authority to promulgate rules and regulations governing the leasing for agricultural and grazing purposes the lands belonging to noncompetent members of the Osage Tribe of Indians, and that such regulations, when promulgated, have the force and effect of law; that to attempt to make leases with noncompetent members of the Osage Tribe of Indians in any other way than in accordance with the rules and regulations of the Secretary of the Interior, and upon the form prescribed by him, is a violation of law, and that parties attempting so to do should be enjoined from so doing.

It is claimed by the appellee, under said acts of Congress, that the Secretary of the Interior has control not only of the matter of approval of leases made and entered into, but of the manner and method of making and entering into such leases between noncompetent members of the Osage Tribe and other people; that is,

that authority is granted not only to approve the leases, but also to promulgate rules and regulations under which such leases shall be made; that a parent of minor members of the Osage Tribe of Indians may not make an agricultural or grazing lease on lands belonging to his minor children, as members of the Osage Tribe, without the approval of the Secretary of the Interior, and under the rules and regulations of the Secretary of the Interior; and that this is true whether the parent of the child be a member of the Osage Tribe of Indians or not, and whether the parent, if a member of the Osage Tribe of Indians, has been granted a certificate of competency or not.

It is further contended by the appellee that this authority claimed also extends to lands inherited by a noncompetent member of the Osage Tribe of Indians from another noncompetent member of the Osage Tribe of Indians, and to lands obtained by will from a noncompetent member of the tribe by another noncompetent member, especially so where there is a clause in the will providing that the beneficiary of the will may not dispose of the lands devised except upon the approval of the Secretary of the Interior. The act of Congress upon which the claim for this authority is based is Section 7 of the act of Congress approved June 28, 1906, 34 Stat. L. 545, as follows:

Sec. 7. "That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members or their heirs shall have the right to use and to lease said land for farming, grazing or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof; provided, that parents of minor members of the

tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority; and provided further, that all leases given on said lands for the benefit of individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

The specific character of leases involved in this controversy, and which the appellee claims to be unlawful, are:

First: Leases made by the white parent of minor members of the Osage Tribe of Indians on lands belonging to said minor members, without the approval of the Secretary of the Interior and without conforming to the rules and regulations.

Second: Leases made by guardians of the estates of minor members of the Osage Tribe of Indians, acting under authority of the County Court of Osage County, Oklahoma, without the approval of the Secretary of the Interior, and not in accordance with the rules and regulations.

Third: Leases made by Osage Indian parents who have certificates of competency, on the lands of their minor children, without the approval of the Secretary of the Interior, and not in conformity with the rules and regulations.

Fourth: Leases made by Osage Indian parents who have not received certificates of competency, upon lands belonging to their minor children, without the approval of the Secretary of the Interior, and not in conformity with the rules and regulations.

Fifth: Leases made by Osage adult Indians, who have certificates of competency, on their homestead al-

lotments, not approved by the Secretary of the Interior, and not in conformity with the rules and regulations.

Sixth: Leases made on the undivided interest of lands inherited by a white parent, or person, where the other interest is inherited by a noncompetent member of the Osage Tribe of Indians, unless approved by the Secretary of the Interior, and in conformity with the rules and regulations.

Seventh: Leases made by the purchaser of an undivided interest in what was formerly an Osage allotment, where the other interest is owned by a noncompetent member of the Osage Tribe of Indians, not approved by the Secretary of the Interior, and not in conformity with the rules and regulations.

Eighth: Leases made by the father of a minor Osage allottee who died intestate, where the mother of the minor is a white woman and the father a competent Osage Indian, and where the father purchased the undivided interest of the moth, the lease being made by the father, not approved by the Secretary of the Interior, and not in conformity with the rules and regulations.

Ninth: Leases made by a competent member of the Osage Tribe of Indians on undivided interest in lands inherited by them, the lease being made on the interest of such competent Indians, not approved by the Secretary of the Interior, and not in conformity with the rules and regulations.

Tenth: That it is unlawful for the lessee of an undivided interest in lands where the lease is taken from a white person, or an Osage Indian who has a certificate of competency, to take possession of said undivided interest and use the same, without first obtain-

ing a lease from the noncompetent Osage allottee who owns the other interest, in conformity with the rules and regulations, and with the approval of the Secretary of the Interior.

Eleventh: Leases made by heirs of a deceased allottee, in cases where the land was decided to the heirs, and not to the allottee, because of the fact that the allottee died before selecting allotment, that such lease was void unless made in accordance with the rules and regulations, and approved by the Secretary of the Interior.

Twelfth: That the United States has such an interest in lands which have been leased in conformity with the rules and regulations and with the approval of the Secretary of the Interior, and possession thereof being taken by the lessee, as to maintain an action in injunction against a trespasser on said lands for the benefit of the lessee.

The appellants contend that the act of Congress referred to, by its very terms, contemplates:

First: That members of the Osage Tribe of Indians shall be permitted to make leases upon their lands in such manner and in such form as they see fit, and that the responsibility for the making of the contract of lease shall rest upon the Indian, unhampered, unrestricted and uncontrolled by any rules and regulations of the Secretary of the Interior, subject only to the approval of the Secretary of the Interior in cases where the Indian has not received a certificate of competency and where the land is the Indian's restricted land.

Second: That where members of the tribe have certificates of competency such members may lease his

own surplus lands for grazing and agricultural purposes in such way as he sees fit, without the approval of the Secretary of the Interior, and may also lease the land of his minor children under such terms and conditions as he sees fit, without the approval of the Secretary of the Interior.

Third: That white parents of minor members of the Osage Tribe of Indians may lease the minor's lands, under such terms and conditions as they see fit, not beyond the minor's minority, without the approval of the Secretary of the Interior.

Fourth: That the heir of restricted lands from a noncompetent Indian, where such heir has a certificate of competency, or is a white person, may lease the lands so inherited, upon such terms and conditions as he sees fit, and without the approval of the Secretary of the Interior.

Fifth: That where lands are acquired by will, whether acquired by a noncompetent Osage allottee or an Osage allottee who has received a certificate of competency, or by a white person, such person may lease said lands in such manner and in such way as he sees fit, without the approval of the Secretary of the Interior.

Sixth: That the parents of minor members of the Osage Tribe of Indians, where the parents have not received certificates of competency, may lease the land of said minors in such manner and in such way as they see fit, without the approval of the Secretary of the Interior.

Seventh: That the heirs of deceased allottees, where the allottee died before making selection of an allot-

ment, and where the deed was issued to the heirs of such allottee, such heirs may lease the same without complying with the rules and regulations, and without the approval of the Secretary of the Interior.

Eighth: That the United States has no authority where lands have been regularly leased in accordance with the rules and regulations of the Secretary of the Interior, and with his approval, to maintain an action in injunction, to prevent trespass by a third person.

These are the propositions presented to the lower court by agreed statement of facts in this case, and upon which the court entered its decree, said decree being as follows:

"DECREE.

"Now, on this eighth day of November, 1917, this cause came on to be determined, the same being one of the regular judicial days of the special October Term of said court, held at Oklahoma City, Oklahoma; the plaintiff appearing by John A. Fain, United States Attorney, and by Redmond S. Cole, Assistant United States Attorney, and the defendants appearing by Leahy & Macdonald, their attorneys; and upon consideration of the pleadings and the agreed statements of fact, it was ordered and adjudged and decreed as follows:

"That the plaintiff has the right and the duty to enforce its policy towards the Osage Indians in the matter of alienating and leasing their lands, as contained in the legislation of Congress, which limits the power of allottees to alienate their allotments, where the restrictions upon alienation have not been removed, in conformity with the rules and regulations promulgated by the Secretary of the Interior, and further that this suit was properly brought for equitable relief.

"The court finds the defendants are leasing and taking leases of the allotments of minor members of the Osage Tribe of Indians, executed by the parents of said minors, in cases where one parent is a white person, and not a member of the Osage Tribe of Indians, and the other parent of the minor is a member of the Osage Tribe of Indians, to whom a certificate had been issued, under the Act of Congress of June 28, 1906; and that said leases are made without the approval of the Secretary of the Interior.

"It is ordered and adjudged and decreed that all such leases upon minor allottees' lands are invalid, unless approved by the Secretary of the Interior; and the defendants are hereby enjoined from leasing any lands of such kind and character, without the approval of the Secretary of the Interior, and from in any manner using or enclosing such lands, without the approval of the Secretary of the Interior.

"The court further finds the defendants have leased the allotments of Robert A. Lombard, Evart Che-she-wal-la and Andrew Pryor, all minor members of the Osage Tribe of Indians, whose fathers are dead, the said leases having been executed by the mothers of said minors, who are all white women, and not members of the Osage Tribe of Indians; and that said leases have not been approved by the Secretary of the Interior.

"It is ordered, adjudged and decreed that said leases, and other leases upon lands of like kind and character are invalid, and the defendants are hereby enjoined from in any manner using or occupying lands of this character, or leasing same, or enclosing same, without the approval of the Secretary of the Interior.

"The court further finds the defendants have a lease upon the allotment of Hiram Taylor, a minor Osage allottee; that said minor allottee has a guardian, who was appointed by the County Court of Osage County, Oklahoma; that said lease was executed by the guardian

of said minor allottee, and duly approved by the County Court of Osage County, Oklahoma; that defendants have other leases executed by guardians of like kind and character.

"The court finds that said leases are valid, without the approval of the Secretary of the Interior, and it is, therefore, ordered and adjudged and decreed that an injunction upon this class of lands be, and the same is, hereby denied.

"The court further finds that the defendants have a lease upon the homestead allotment of Bessie Bruce, a member of the Osage Tribe of Indians, to whom a certificate of competency was issued under the Act of June 28, 1906, which lease was executed by the allottee after the delivery of the said certificate of competency, and was not approved by the Secretary of the Interior; that said lease is an alienation of the premises, and is in violation of the act of Congress above mentioned, and is invalid, without the approval of the Secretary of the Interior.

"It is, therefore, ordered, adjudged and decreed that the defendants be, and they are hereby enjoined from leasing or occupying or using said homestead allotment of Bessie Bruce, without the approval of the Secretary of the Interior. The defendants are further enjoined from leasing, occupying or using any other homestead allotments of members of the Osage Tribe of Indians of like kind and character as the Bessie Bruce allotment, without the approval of the Secretary of the Interior.

"The court further finds the defendants have a lease upon the surplus allotments of Lena Bruce, a member of the Osage Tribe of Indians, and that said Lena Bruce has never received a certificate of competency.

"It is ordered, adjudged and decreed that said lease is invalid, and the defendants are hereby enjoined

from using said lands, or enclosing same, and from leasing said lands, or any other lands in Osage County of like kind and character, without the approval of the Secretary of the Interior.

"The court finds that the defendants have a lease on 160 acres of land allotted to Walter Harvey, deceased, a member of the Osage Tribe of Indians; that the heirs at law of Walter Harvey are Mary Harvey, his mother, an Osage Indian to whom a certificate of competency has not been issued, and his father, Luther Harvey, a member of the Osage Tribe of Indians, who has received a certificate of competency; that Luther Harvey mortgaged his one-half interest, and the mortgage was foreclosed, and R. C. Drummond, a white man, and not a member of the tribe, became the owner of an undivided one-half interest in said tract of land; that the said Luther Harvey had a right to alienate said one-half interest; that the lease held by the defendants is executed by Mary Harvey and R. C. Drummond, above mentioned, and was not approved by the Secretary of the Interior.

"It is ordered, adjudged and decreed that the lease on the undivided one-half interest of said land by Drummond to the defendants is valid; and that the lease to the defendants by Mary Harvey, on the other one-half interest, is invalid, without the approval of the Secretary of the Interior, and that the defendants be, and they are, hereby enjoined from leasing said undivided one-half interest of Mary Harvey, or in any manner dealing with said undivided one-half interest, without the approval of the Secretary of the Interior.

"The court further finds that the defendants have a lease upon the south half of section twenty-eight (28), township twenty-seven (27), range seven (7), in Osage County, Oklahoma, executed by Antwine Hunt, as lessor; that the said land was allotted Harold R. Hunt, as a member of the Osage Tribe of Indians; that the said Harold R. Hunt died in infancy, leaving as his sole and

only heirs at law, his father, Antwine Hunt, who has never received a certificate of competency, and Hazel May Hunt, his mother, a white woman, not a member of the Osage Tribe of Indians; that said heirs at law suceeded to the land equally; that said Hazel May Hunt conveyed by warranty deed her interest to Joseph D. Mitchell, and the said Antwine Hunt purchased said undivided one-half interest from Joseph D. Mitchell, and is now the owner of the entire tract of land; that the undivided one-half interest of Hazel May Hunt was not restricted; that the said undivided one-half interest inherited by Antwine Hunt is restricted, and cannot be leased without the approval of the Secretary of the Interior.

"It is ordered, adjudged and decreed that the lease on the undivided one-half interest in said land which is restricted, as aforesaid, is invalid; and the defendants are hereby enjoined from leasing said restricted undivided one-half interest, without the approval of the Secretary of the Interior, or in any manner dealing with said undivided one-half interest, without the approval of the Secretary of the Interior, and that an injunction herein be denied as to the leasing or dealing with the other undivided one-half interest in said land.

"The court further finds that the defendants have a lease upon the allotment of Cecilia Rogers, a minor, a member of the Osage Tribe of Indians, executed by the father and mother of said minor; that the father and mother of said minor, prior to the execution of said lease, had both received certificates of competency, under the Act of June 28, 1906; and that said lease has not been approved by the Secretary of the Interior.

"It is ordered, adjudged and decreed that the defendants be, and they are hereby enjoined from occupying or using said lands, or in any manner dealing with said lands, or lands of like kind and character, without the approval of the Secretary of the Interior.

"The court further finds that the defendants have a lease on the lands allotted to Hun-kah, a minor, a member of the Osage Tribe of Indians, which lease is executed by the father of said minor; that the father has received a certificate of competency.

"It is ordered, adjudged and decreed that the defendants be, and they are hereby enjoined from occupying or using, or in any manner dealing with said lands, or with lands of like kind and character, without the approval of the Secretary of the Interior.

"The court finds that the defendants have a lease upon the lands allotted to Tsa-pah-ke-ah, which lease has been approved by the Secretary of the Interior.

"It is ordered, adjudged and decreed that the said lease is valid and an injunction be, and the same is, hereby denied, as to said land.

"The court further finds that the defendants own an undivided four-ninths (4-9) interest in the lands described in the will as allotted to Wy-uh-ah-kah, deceased; that his estate has been administered in the County Court of Osage County, Oklahoma; that certain of his heirs at law are Hah-ah-me-tsa-he, who succeeded to an undivided one-third (1-3) interest; Grace Merril, who succeeded to an undivided one-ninth (1-9) interest, and Andrew Penn, who succeeded to an undivided one-ninth (1-9) interest; none of whom ever received a certificate of competency, under the Act of Congress of June 28, 1906; that the decedent was a noncompetent member of the Osage Tribe of Indians; that Jennie Gray and John Oberly, his other heirs at law, succeeded to an undivided four-ninths (4-9) interest in said property, and prior to inheriting said lands, these parties had received certificates of competency; and subsequently conveyed the undivided four-ninths (4-9) interest to the defendants; that all of said lands are the subject of an action for the partition thereof, which action is pending in the District Court of Osage County, Oklahoma; that Andrew Penn is dead, and his estate is

now being administered in the County Court of Osage County, Oklahoma; that the defendants are using said land, and are ready and willing to pay the other tenants in common their portion or share of the usable or rental value of the said lands.

"It is ordered, adjudged and decreed that the defendants own an undivided four-ninths (4-9) interest in said lands, and that the interest of the heirs at law, above set out, of the other five-ninths (5-9) interest, is restricted, and that the defendants be, and they are hereby enjoined from leasing said five-ninths (5-9) restricted interest in said land, without the approval of the Secretary of the Interior, and are enjoined from occupying or using the premises, or any part thereof, without the approval of the Secretary of the Interior.

"The court further finds that certain lands mentioned in the will were allotted to Wah-tsa-moie, a member of the Osage Tribe of Indians; that he died without having received a certificate of competency, leaving as his sole and only heirs at law, Martha Pryor, and Michael Wah-tsa-moie, members of the Osage Tribe of Indians, neither of whom had received certificates of competency, and Harry Wah-tsa-moie, who was not enrolled as a member of the Osage Tribe of Indians, each of said heirs at law succeeding to an undivided one-third (1-3) interest; that Harry Wah-tsa-moie died intestate, and his mother, Martha Pryor, succeeded to an undivided one-third (1-3) interest inherited by him from his father; that said Harry Wah-tsa-moie, being a nonmember of the tribe, under the Act of April 18, 1912, restrictions from said interest were removed; that the defendants bought said undivided one-third (1-3) interest which was unrestricted, and are the owners thereof; that they are occupying the land with the consent of Martha Pryor, who is an adult, the other heir, Michael Wah-tsa-moie being a minor; that the defendants are able and willing to pay the portion of the usable value or the rental of said land due the other tenants in common; that the Secretary of the Interior

has not consented to the occupancy of said land by the defendants, and the defendants have no approved lease on the undivided two-thirds (2-3) interest in said land which was restricted.

"It is ordered, adjudged and decreed that the defendants are the owners of an undivided one-third (1-3) interest in said lands, and that Martha Pryor and Michael Wah-tsa-moie are the owners of an undivided two-thirds (2-3) interest in said lands, which said two-thirds (2-3) interest remains restricted under Section 4 of the Act of June 28, 1906; that the defendants and each of them are hereby enjoined from in any manner occupying or using the said lands, or any portion thereof, or from enclosing same, or in any manner dealing with said lands, or any part thereof, without the consent of the Secretary of the Interior, or without procuring a lease upon the undivided one-third (1-3) interest which is restricted.

"The court further finds that the defendants are not using or dealing with the lands allotted to Wah-rah-lum-pah, mentioned in the bill, and are not leasing same, and no ground appears for an injunction, and it is therefore denied.

"The court further finds that the defendants have a lease upon the east half of the southwest quarter and the west half of the southeast quarter of section ten (10), township twenty-eight (28), range seven (7), in Osage County, Oklahoma, which land was allotted to the heirs of Wah-shah-me-tsa-he, deceased, Osage allottee No. 770; that said allottee died intestate on August 3, 1907, and at the time of her death had not selected any land under the Allotment Act; that her sole and only heirs at law are Ho-ki-ah-se and Me-tsa-he, both adults and members of the Osage Tribe of Indians, and neither of said parties ever have received a certificate of competency; that said lease was executed by the said heirs, and was not approved by the Secre-

tary of the Interior; that the defendants have other leases upon lands of similar character.

"It is ordered, adjudged and decreed that said lands are subject to the restrictions under Section 4 of the Act of June 28, 1906, and that leases on said lands, and similar lands, are invalid, without the approval of the Secretary of the Interior, and that the defendants be, and they are, hereby enjoined from leasing or occupying, or in any manner dealing with said lands, or any other lands of like kind and character, without the approval of the Secretary of the Interior.

"The court further finds that the defendants have a lease upon the northeast quarter of section fifteen (15), township twenty-eight (28), range six (6), in Osage County, Oklahoma, which land was allotted as surplus land to Jack Wheeler, Osage allottee number 728; that the said Jack Wheeler died testate on the 16th day of May, 1916, leaving a will, which has been legally admitted to probate by the County Court of Osage County, Oklahoma; that under the will of said decedent, Nah-me-tsa-he acquired said land as devisee; that the said devisee is a member of the Osage Tribe of Indians, and has never received a certificate of competency; that she leased said lands to the defendants, and that said lease was not approved by the Secretary of the Interior.

"The court finds the land is subject to administration in the County Court of Osage County, Oklahoma, under Section 3 of the Act of April 18, 1912, and to lease by the administrator, and that said administrator may collect the rents on said land, without the approval of the Secretary of the Interior, and that it does not appear herein that an administrator for said estate has been appointed.

"It is ordered, adjudged and decreed that the effect of the said will was to designate the successors, in lieu of those to whom the land would otherwise descend, under the laws of the State of Oklahoma, that the will

of Jack Wheeler did not remove the restrictions thereon, and the said Nah-me-tsa-he took said lands subject to all the restrictions against alienation, as provided for in the Act of June 28, 1906, and that the defendants, and each of them, he and they are, hereby enjoined from using or occupying or leasing, or in any manner dealing with said lands, or lands of similar character in Osage County, Oklahoma, without the approval of the Secretary of the Interior.

"The court further finds that the defendants have a lease upon the northeast quarter of section nine (9), township twenty-five (25), range seven (7), in Osage County, Oklahoma, allotted to the heirs of Walter Florer, deceased, the lease being executed by a white man, not a member of the Osage Tribe of Indians, to whom Ke-ah-som-pah, the devisee named in the will of Kah-wah-e, had conveyed said land by warranty deed; that this land was allotted to the heirs of Walter Florer, deceased, under Act of Congress approved June 28, 1906, and Walter Florer was enrolled as a member of the Osage Tribe of Indians, and died intestate between January first, 1906, and June 28th, 1906, leaving as his sole and only heir at law Kah-wah-e; that neither Walter Florer, Kah-wah-e nor Ke-ah-som-pah ever received a certificate of competency, under the above act of Congress; that Kah-wah-e died, leaving a will, which was duly approved by the Secretary of the Interior, and which will, by the 15th paragraph thereof, provides:

"'All devises of real estate made hereunder are made subject to the condition that the real estate shall not be encumbered or alienated, without the consent of the Secretary of the Interior.'

that neither the deed nor the lease above mentioned were approved by the Secretary of the Interior.

"It is ordered, adjudged and decreed that under the Act of June 28, 1906, the lands allotted to the heirs of Walter Florer, deceased, were restricted, and said

heirs took the lands subject to the restrictions against alienation, the same as if the land had been selected by Walter Florer, and allotted to him during his lifetime; that said conveyance and said lease are invalid, and of no force and effect, without the approval of the Secretary of the Interior, and that the defendants, and each of them, be, and they are, hereby enjoined from using, conveying, enclosing or leasing the land above mentioned, or any other land of like kind or character, without the approval of the Secretary of the Interior.

"The court further finds the lands mentioned in the bill as allotted to Jesse James, are leased to H. G. Exell, under the departmental rules and regulations, which lease is approved by the Secretary of the Interior, and is valid, and that the rental due on said lease is paid.

"It is therefore ordered, adjudged and decreed that there is no duty imposed upon the plaintiff to protect the interests of said Exell, as lessee, and plaintiff is without authority to maintain this suit for injunction, so far as this land is concerned, that an injunction herein be, and the same is hereby denied, as to said land.

"It is further ordered, adjudged and decreed that the defendants and each of them, and their agents and employees, be, and they are hereby, enjoined from leasing for grazing and agricultural purposes, either directly or indirectly, in their own names or in the name of other persons, firms or corporations, and from dealing in leases on, using, occupying and enclosing for themselves or for others, any of the lands described in this decree as restricted lands, and all other lands in Osage County, Oklahoma, of like status and character, allotted to members of the Osage Tribe of Indians in Oklahoma, without the approval of the Secretary of the Interior.

"It is further ordered, adjudged and decreed that the costs of this action be taxed against the defendants.

"To said decree of the court, and every part thereof wherein the defendants, or either of them, are enjoined, the defendants, and each of them, except, and pray the court for an appeal from said decree to the Circuit Court of Appeals.

"To which decree, in refusing to grant plaintiff an injunction, as prayed for, the plaintiff excepts.

"It is further ordered that the appeal be, and the same is, hereby granted to the defendants, upon the giving by them jointly of a bond, conditioned as provided by law, in the sum of five hundred dollars.

"*Jas.* H. COTTERAL, *District Judge*

"O. K. REDMOND S. COLE,
"*Assistant U. S. Attorney.*

"O. K. LEAHY & MACDONALD.

"Endorsed: Filed in District Court November 8, 1917."

ERRORS COMPLAINED OF IN DISTRICT COURT

The errors complained of in the case are briefly as follows:

First: The court erred in finding and holding as a matter of law that the Act of Congress of June 28, 1906, above referred to, conferred upon the Secretary of the Interior the right and duty to promulgate rules and regulations governing the leasing of the lands of members of the Osage Tribe of Indians for agricultural and grazing purposes, and that the allottee and lessee were bound by such rules and regulations, and that the same

had the force and effect of law; and in not holding that the only authority conferred by such statute upon the Secretary of the Interior was the mere right of approval of such leases.

Second: The court erred in finding and holding as a matter of law that leases made by the white parent, the Indian parent being dead, on lands belonging to minor members of the Osage Tribe of Indians, were subject to the approval of the Secretary of the Interior, and must be made in conformity with his rules and regulations.

Third: The court erred in finding and holding as a matter of law that leases made by members of the Osage Tribe of Indians who had received certificates of competency, on the land belonging to the minor children of such persons, were subject to the approval of the Secretary of the Interior, and must be made in accordance with his rules and regulations.

Fourth: The court erred in finding and holding as a matter of law that leases of land by a noncompetent Osage allottee, on land belonging to his minor children, were subject to the approval of the Secretary of the Interior, and must be made in conformity with his rules and regulations.

Fifth: The court erred in finding and holding as a matter of law that leases made by parents of minor members of the Osage Tribe of Indians, where one of the parents was a white person and the other parent a competent Osage Indian, were subject to the approval of the Secretary of the Interior, and must be made in accordance with his rules and regulations.

Sixth: The court erred in finding and holding as a matter of law that lands coming to a noncompetent member of the Osage Tribe of Indians by will, duly approved by the Secretary of the Interior, from another noncompetent member of the Osage Tribe of Indians, in whom the lands were restricted, could not be leased by said devisee of the will except in accordance with the rules and regulations of the Secretary of the Interior, and erred in holding the Secretary of the Interior had the power to the terms as to alienation, or requiring the testator to incorporate a clause in said will preventing alienation without the consent of the Secretary, and erred in holding such clause in such will effective to prevent alienation, without the approval of the Secretary of the Interior.

Seventh: The court erred in finding and holding as a matter of law that the lessee of a person who owned an unrestricted undivided interest in Osage lands, where the other interest was held by a noncompetent member of the Osage Tribe of Indians, by inheritance or will, could not take possession of said undivided interest without first obtaining a lease from the noncompetent member of the Osage Tribe who held the other undivided interest, in accordance with the rules and regulations of the Secretary of the Interior, and upon his approval.

Eighth: The court erred in finding and holding as a matter of law that the owner of an undivided interest in lands inherited from a noncompetent member of the Osage Tribe of Indians, such owner being a white person, or a person not a member of the Osage Tribe of Indians, could not lease such undivided interest and put the lessee in possession thereof, without

such lessee obtaining an approved lease from the owner of the other interest.

Ninth: The court erred in finding and holding as a matter of law that lands partitioned to a noncompetent member of the Osage Tribe of Indians, which partition proceedings had been approved by the Secretary of the Interior, could not be leased except in conformity with the rules and regulations and with the approval of the Secretary of the Interior.

Tenth: The court erred in finding and holding as a matter of law that the lands allotted to the heirs of a deceased Osage allottee, where such deceased allottee died prior to selecting said allotment, and where the deed was issued to the heirs, could not make a valid lease on the same, except in accordance with the rules and regulations and with the approval of the Secretary of the Interior.

Decree of Circuit Court of Appeals.

These causes came on to be heard on the transcripts of the records from the District Court of the United States for the Western District of Oklahoma, and were argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in these causes, be, and the same is hereby, modified in accordance with the terms of the opinion of this Court, and that as thus modified the decree of the said District Court in these causes be, and the same is hereby, affirmed without costs to either party in this Court; the costs in said District

Court to be assessed against the Defendants, George G. La Motte and Anna Marx La Motte.

January 30, 1919.

Assignments of Error.

Now, on this 21st day of November, 1917, came the above named defendants, by their solicitors, T. J. Leahy and C. S. Macdonald, and say:

That the Decree made and entered in the above entitled cause on the 8th day of November, 1917, against the defendants and in favor of the plaintiff, is erroneous and unjust to the defendants, for the following reasons:

First. The Court erred in not sustained the motion of the defendants to dismiss the Bill of Complaint of the plaintiff.

Second. The Court erred in rendering a final Decree against the defendants, and in favor of the plaintiff, and in holding and decreeing that leases made by the parents of minor Osage allottees, where one parent is a white person, and not a member of the Tribe, and the other parent holds a certificate of competency, are invalid unless approved by the Secretary of the Interior; and in enjoining the defendants from occupying or leasing such land, without the approval of the Secretary of the Interior.

Third. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, and in holding and decreeing that the leases held by the defendants upon lands allotted to minor members of the Osage Tribe of Indians, which leases were executed by the mothers of said minors, the mothers being white persons, and nonmembers of the Tribe, and the fathers of said minors being dead, were invalid, without

the approval of the Secretary of the Interior, and the Court erred in granting an injunction in such cases.

Fourth. The Court erred in rendering a final Decree against the defendants, enjoining them from leasing homestead allotments of members of the Osage Tribe of Indians, where such member has received a certificate of competency.

Fifth. The Court erred in rendering final Decree against the defendants and in favor of the plaintiff, and in granting an injunction against the defendants, enjoining them from dealing with the lands allotted to Walter Harvey, upon which the defendants have a lease from the white person owning an undivided one-half interest therein, and a noncompetent Indian owning the other undivided one-half interest; and the Court erred in enjoining the defendants from in any manner dealing with the restricted undivided one-half interest, without the approval of the Secretary of the Interior.

Sixth. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, enjoining the defendants from in any manner dealing with the undivided one-half interest, without the approval of the Secretary of the Interior, of the South Half of Section Twenty-eight (28), Township Twenty-seven (27), Range Seven (7), which land was owned by Antwine Hunt, an undivided one-half interest of which is alienable, without the approval of the Secretary of the Interior, and an undivided one-half interest of which is inalienable, without the approval of the Secretary of the Interior.

Seventh. The Court erred in rendering a final Decree against the defendants, and in favor of the plaintiff, and in holding and decreeing that the lands allotted minor Osage Indians could not be leased by the parents of such minors, where the parents have been issued certificates of competency, without the approval of the Secretary of the Interior.

Eighth. The Court erred in rendering final Decree against the defendants and in favor of the plaintiff, enjoining the defendants from occupying, or using or leasing, without the consent of the Secretary of the Interior, the lands allotted Hun-kah, a minor member of the Osage Tribe of Indians, where the father of said minor has a certificate of competency, and executes the lease without the approval of the Secretary of the Interior, and the mother is a noncompetent member of the Osage Tribe of Indians, and does not join in said lease.

Ninth. The Court erred in rendering final Decree against the defendants and in favor of the plaintiff, and in holding and decreeing that the lands allotted to Wy-u-hah-kah, a noncompetent member of the Osage Tribe of Indians, who died leaving competent and noncompetent heirs at law, were restricted lands, and the defendants, who were the owners of an undivided four-ninth's interest in said lands, could not use or occupy said lands, without the consent and approval of the Secretary of the Interior; and the Court erred in holding that the plaintiff could maintain this action, when the said lands were the subject of a suit pending in the District Court of Osage County, Oklahoma, for a partition thereof; and erred in holding that the defendants, who were tenants in common with noncompetent members of the Osage Tribe of Indians, could not lease, or occupy, or use said premises, without the consent of the Secretary of the Interior, or without an approved lease upon the restricted interest of said tenants in common.

Tenth. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, and in holding that the plaintiff might maintain this suit against the defendants, who were the owners of an undivided one-third interest in the lands allotted to Wah-tsa-moie, deceased, a noncompetent member of the Osage Tribe of Indians, and erred in holding that the defendants, who were the owners of an undivided one-third interest, could not occupy or use said

premises, without the consent of the Secretary of the Interior, or without obtaining an approved lease upon the other undivided two-third's interest, which is owned by noncompetent members of the Osage Tribe of Indians.

Eleventh. The Court erred in rendering final Decree against the defendants and in favor of the plaintiff, enjoining the defendants from occupying, using or leasing without the approval of the Secretary of the Interior, the East Half of the Southwest Quarter, and the West Half of the Southeast Quarter of Section Ten (10), Township Twenty-eight (28), Range Seven (7), in Osage County, Oklahoma, which land was allotted to the heirs of Wah-shah-me-tsa-he, deceased Osage Allottee No. 707, and erred in holding that said lands were restricted, and that the heirs at law of said decedent, who are noncompetent members of the Osage Tribe of Indians, could not lease said lands without the approval of the Secretary of the Interior; and the Court erred in holding that the restrictions against alienation, under the Act approved June 28th, 1906, were applicable to other than living members of the Osage Tribe of Indians, who had selected lands under said Act.

Twelfth. The Court erred in rendering a final Decree against the defendants and in favor of the plaintiff, enjoining the defendants from using, or occupying, and in holding the lease of the defendants invalid on the Northeast Quarter of Section Fifteen (15), Township Twenty-eight (28), Range Six (6), in Osage County, Oklahoma, without the consent of the Secretary of the Interior, or the approval of such lease by the Secretary of the Interior; and erred in holding that the will of Jack Wheeler, which was approved by the Secretary of the Interior, was not a removal of restrictions upon said lands; and erred in holding that the devisee under said will, took said lands subject to the restrictions under the Act of Congress of June 28th, 1906, against alienation; and erred in holding that the effect

of a will is to designate the successors, in lieu of those to whom the land would descend under the laws of descent and distribution, applicable to the Osage Tribe of Indians, and that the devisee in said will being a noncompetent member of the Osage Tribe of Indians, acquired said land subject to the inhibition against alienation, in the same manner as a noncompetent heir at law would succeed to said land.

Thirteenth. The Court erred in rendering a final Decree against the defendants and in favor of plaintiff, enjoining the defendant from occupying or using, or in any manner dealing with the Northeast Quarter of Section Nine (9), Township Twenty-five (25), Range Seven (7), in Osage County, Oklahoma, without the consent or approval of the Secretary of the Interior; and erred in holding that the plaintiff had any authority to maintain this suit; and erred in holding that lands allotted to heirs of deceased members of the Osage Tribe of Indians were in any manner restricted, or that the heirs at law were restricted from alienating said land; and erred in holding that the restrictions against alienation, expressed in the Act of June 28th, 1906, applied to such lands; and erred in construing the Act of Congress of June 28th, 1906, to impose restrictions upon lands allotted to deceased members of the Tribe; and the Court further erred in holding that the will of Kah-wah-c, which was duly approved by the Secretary of the Interior, was not a removal of restrictions; and in holding that the Secretary of the Interior had authority, under the Act of Congress of April 18th, 1912, to prescribe terms, or require the testator to incorporate a clause in the will, prohibiting the devisee from alienating said lands; and the Court erred in holding that the clause in the will of Kah-wah-c had the legal effect of preventing the devisee from legally conveying her interest in said property, so devised; and erred in holding that the said clause 15, in the said will was of any force or effect, whatever.

Fourteenth. The Decree is contrary to both law and equity.

Wherefore, The defendants pray that the said Decree be reversed, and the District Court be directed to dismiss the complaint, and the defendants have all other relief which to the Court may seem equitable, just and proper, the premises considered.

T. J. LEAHY,

C. S. MACDONALD,

Solicitors for the Defendants.

(*Assignment of Errors of George G. La Motte et al. on Appeal to Supreme Court U. S.*)

Come now George G. and Anna Marx La Motte by their solicitors, T. J. Leahy, Esq., and C. S. Macdonald, Esq., and say that the decree rendered and entered in the above entitled causes on the 30th day of January, 1919, against the appellants, George G. and Anna Marx La Motte, and in favor of the United States of America, is erroneous and unjust to them for the following reasons:

First. The Court erred in modifying the judgment of the United States District Court for the Western District of Oklahoma in favor of appellants, by which judgment the lower court held that a lease upon minor Osage allottee lands made by a duly appointed qualified guardian and approval by the County Court was valid without the approval of the Secretary of the Interior, and in holding that such lease required the approval of the Secretary of the Interior.

Second. The Court erred in affirming the judgment of the United States District Court for the West-

ern District of Oklahoma in favor of the appellee and against the appellants.

Third. The Court erred in not reversing the decree of the United States District Court for the Western District of Oklahoma restraining the defendants from leasing lands as described in the decree.

Fourth. The Court erred in holding that there was a clear ground for equitable interference by the Government under the allegations of the bill.

Fifth. The Court erred in modifying the decree of the lower court and affirming the decree of the lower court as modified, and in holding and decreeing that leases made by a guardian duly appointed by the County Court of Osage County, Oklahoma, and said leases being approved by said court, were invalid without the approval of the Secretary of the Interior.

Sixth. The Court erred in holding that the Osage Allotment Act of June 28, 1906 (34 Statutes at Large, page 539), governed and controlled the questions at issue in this cause and that the Act of April 18, 1912 (37 Statutes at Large, Page 86), did not affect the questions at issue and was not controlled as to the guardianship cases in question and as to the questions upon lands acquired under will duly approved by the Secretary of the Interior under the provisions of the Act of April 18, 1912.

Seventh. The Court erred in not holding in favor of appellants and in decreeing that leases made by the parents of Osage minor allottees where one parent is a white person and not a member of the tribe and the other parent a member of the tribe and having a certificate of competency are invalid unless approved by the Secretary of the Interior and in affirming the judgment of the lower court enjoining the appellants from occupying or leasing such lands without such approval.

Eighth. The Court erred in affirming the decree of the lower court against appellants and holding that the lease held by appellants upon lands allotted to minor members of the Osage Tribe of Indians, which leases were executed by the mothers of said members, the mothers being white persons and nonmembers of the tribe, and the fathers of said members being dead, were invalid, without the approval of the Secretary of the Interior, and erred in granting an injunction in said cause.

Ninth. The Court erred in affirming the judgment of the lower court in enjoining the defendants from dealing with lands allotted to Walter Harvey upon which the appellants have a lease from a white person owning an undivided one-half interest therein and a non-competent Indian owning the other one-half interest, which lease was not approved by the Secretary of the Interior, and erred in holding that appellants could not use any part of said lands.

Tenth. The Court erred in affirming the decree of the lower Court against the appellants and in favor of appellee enjoining appellants from in any manner dealing with or occupying any portion of the lands in which appellants own undivided interest without a lease duly approved by the Secretary of the Interior from their tenants in common who were non-competent Indians.

Eleventh. The Court erred in affirming the judgment of the lower court enjoining the appellants from occupying or in any manner dealing with their undivided interest in lands allotted to a non-competent member of the Osage Tribe of Indians where such member died leaving competent and non-competent heirs at law, the appellants having purchased the interest of the competent heirs, the same being a four-ninths interest in said lands, and which land was the subject of a petition suit pending in the District Court of Osage County, Oklahoma, at the time the injunction was granted, and erred in holding that the appellants could not in any

manner deal with any interest in said lands by way of using or leasing their interest without a lease approved by the Secretary of the Interior.

Twelfth. The Court erred in affirming the decree of the lower Court in holding against the appellants and in favor of appellee in enjoining appellants from using or occupying the Northeast Quarter of Section Fifteen (15), Township Twenty-eight (28), Range Six (6), in Osage County, Oklahoma, and in holding the lease of the appellants invalid on said land without the approval of the Secretary of the Interior, and erred in affirming the lower court and in holding that the will of Jack Wheeler, which will was duly approved by the Secretary of the Interior and filed for probate, was not a removal of restrictions upon the alienation of the lands, and erred in holding that the United States had any interest in said lands which would warrant appellee in maintaining the suit, and erred in affirming the judgment of the lower court and holding that the devisee under said will, she being a non-competent member of the Osage Tribe of Indians acquired said lands subject to the restrictions provided for in the Act of Congress of June 28, 1906, against the alienation and that said devisee could not deal with said lands or alienate same without the approval of the Secretary of the Interior.

Thirteenth. The Court erred in affirming the decree of the lower court against the appellants and in favor of appellee, enjoining the appellants from occupying or using, or in any manner dealing with Northeast Quarter of Section Nine (9), Township Twenty-five (25), Range Seven (7), described in the bill without the consent or approval of the Secretary of the Interior, and erred in holding that the United States had any authority or interest in said lands sufficient to maintain this suit, and erred in holding that lands allotted to the heirs of deceased members of the Osage Tribe of Indians were in any manner restricted or that the heirs at law could not alienate said lands without the approval of the Secretary

of the Interior, and erred in holding that the restrictions against alienation under the Act of Congress approved June 28, 1906 (34 Statutes at Large, page 539) applied to such lands and the Court further erred in affirming the decree of the lower court in holding that the will of Kah-wah-e, which will was duly approved by the Secretary of the Interior and duly probated in the County Court of Osage County, Oklahoma, and the estate administered upon under the Act of Congress of June 28, 1912 (37 Statutes at Large, page 36), by the terms of which will and by the judgment of the County Court of Osage County, Oklahoma, the lessor of the above described lands acquired same was not a removal of restriction, and that the lessor of said lands could not deal with same without the approval of the Secretary of the Interior, and that a lease by the devisee of said lands under said will to the appellants was void unless approved by the Secretary of the Interior; that under the Act of Congress approved April 18, 1912, (37 Statutes at Large, page 36), the Secretary had authority to prescribe terms or require the testator to incorporate a clause in the will prohibiting the devisee from alienating said lands, and erred in holding that the clause in said will had the legal effect of preventing the devisee from legally conveying their interest in said property, as devised, without the approval of the Secretary of the Interior, and erred in holding that the clause in said will No. 15 was of any force or effect whatever.

Fourteenth. The Court erred in holding that the Government has retained control over all lands allotted under the Act of Congress approved June 28, 1906 (34 Statutes at Large, page 539), and in holding that a non-competent member of the Osage Tribe of Indians cannot deal with, dispose of or alienate any lands allotted under said Act of Congress no matter from what source those lands come to such non-competent member without the approval of the Secretary of the Interior, and the Court erred in holding that the controversy is controlled

by the said Act of Congress and not by the Act of Congress of April 18, 1912 (37 Statutes at Large, page 86), and the Court erred in holding that the restrictions were not upon the lands but upon the person and that a non-competent Indian acquiring unrestricted lands by will could not lease said unrestricted lands without the approval of the Secretary of the Interior.

Fifteenth. The judgment and decree is both contrary to law and equity.

Wherefore, appellants pray that said decree be reversed and that said United States Circuit Court of Appeals for the Eighth Circuit be ordered to enter a decree reversing the decision of the lower court in said cause.

T. J. Leahy,
C. S. Macdonald.

BRIEF AND ARGUMENT.

ERRORS No. 4, 14 and 15.

Fourth. The Court erred in holding that there was a clear ground for equitable interference by the Government under the allegations of the Bill. (Rec. p. 70.)

Fourteenth. The Court erred in holding that the Government has retained control over all lands allotted under Act of Congress approved June 28, 1906 (34 Statutes at Large, page 539) and in holding that a non-competent member of the Osage Tribe of Indians cannot deal with, dispose of or alienate any lands allotted under said Act of Congress, no matter from what source those lands come to such non-competent member, without the approval of the Secretary of the Interior, and the Court erred in holding that the controversy is controlled by the said Act of Congress and not by the Act of Congress of April 18, 1912 (37 Statutes at Large, page 86), and the Court erred in holding that the restrictions were not upon the lands but upon the person and that a non-competent Indian acquiring unrestricted lands by will could not lease said unrestricted lands without the approval of the Secretary of the Interior. (Rec. p. 73.)

Fifteenth. The judgment and decree is both contrary to law and equity. (Rec. p. 73.)

We will not discuss the assignments of error in the order in which they are specified, but in the order in which it occurs to us that the propositions involved therein, naturally arise. Hence the departure in the following argument from following the assignments as specified.

The trial court held which was affirmed by the Circuit Court of Appeals that the appellee has the right and duty to enforce its policy toward the Osage Indians, in the matter of leasing their lands for agricultural purposes, and that the acts of Congress relating thereto limit the power of the allottees to lease or alienate their allotments, where the restrictions upon alienation have not been removed, except in conformity with the rules and regulations promulgated by the Secretary of the Interior. (See second paragraph of decree, p. 39, Transcript of Record.)

All of the other findings of the court upholding the contention of the appellee were to a large extent based upon the authority of the Secretary of the Interior to make and enforce rules and regulations with reference to leasing Osage Indian lands. The statute chiefly relied upon in this matter is Section 7 of the Act of Congress of June 28, 1906 (34 Stat. L. 545), which reads as follows:

"Sec. 7. That the *lands herein provided for* are set aside for the *sole use and benefit of the individual members of the tribe entitled thereto*, or to their heirs, as herein provided; and said members or their heirs shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and *said members shall have full control of the same, including the proceeds thereof*; provided, *that parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority*; and provided further, that all leases given on said lands for the *benefit of individual members of the tribe entitled thereto*, or for their heirs, shall be subject *only* to the approval of the Secretary of the Interior."

It will be noted that this section of the statute relates to the question of the leasing of the lands allotted to members of the Osage Tribe of Indians. This statute is very dissimilar to other statutes concerning the leasing of lands by members of other tribes. It will be observed, from careful reading of the same, that Congress intended to give to the allottee the privilege and to throw upon him the responsibility of making leases. More than that, it gives to the allottee full control of the lands, including the proceeds from the same. In cases of minor members of the tribe, it gives to the parents full control and use of said minors' land, together with the proceeds thereof, until the minor arrives at his majority.

The Secretary of the Interior is given authority by this statute *only to approve leases* where they are made for the benefit of individual members of the tribe entitled thereto. It seems clear, from the reading of this statute, that Congress must have had in mind the necessity of educating the Indian in the handling of his lands and in making contracts concerning them, the one protection being given, and that is, whatever contract he might make must be approved by the Secretary, and this duty of approval was conferred upon the Secretary merely to guard against improvident contracts. The whole statute quoted carries with it the idea of the right of the Indian to make such contract as he wishes, subject only to approval, and he was not to be circumscribed or limited in the character of contracts he might make by rules and regulations. If it were intended that the Secretary should have the right to make rules and regulations, Congress would unquestionably either have said so, in plain terms or by implication, but instead of that it appears that Congress specifically lim-

ited the authority of the Secretary to the mere question of approval, for no other construction can be given to the word "only" found in the last line of said section.

As is well known, the Osage Indians are a wealthy people, and each member of the tribe has a large income. We assume that the court will take judicial notice of the fact that each member of the tribe had allotted to him or her approximately 659 acres, and in addition to that each member had set aside for him or her, as trust fund, nearly $3,817.00; that they have very valuable oil and gas interests, the same being reserved in the tribe by Section 3 of the act, which brings an immense revenue, so that the purpose of Congress in alloting the Osage Indians was not particularly to protect them from poverty, but also, because of their immense income, to give them an opportunity to be educated in handling their own affairs. As was said by the Supreme Court of the United States in the case of *McCurdy* v. *The United States*, decided March 4, 1918, found in L. C. P. Adv. Sheet of April 1, 1918, p. 288:

"Congress apparently believed that, in order to prepare the Indian for complete independence, he must be educated in self-control, and that this could best be done by committing to him gradually the care of his property. The course necessarily involved the risk of some property being lost through improvidence. But in the case of the Osages the risk was not attended by serious danger. Even if the whole trust fund should be released and, despite supervision, improvidently spent, the legally competent allottee would still have his homestead and his share in valuable undivided oil, gas and coal rights; and the legally incompetent, his surplus lands in addition. There is nothing in the act or in the facts to which it applies that indicates a purpose to extend governmental control to property in which released funds may be invested."

The reasoning of the court with reference to the use that should be made of trust funds after being released might well be applied to the control of the Osage Indian over his lands, and the use he might make of the income from the same.

The Osage Allotment Act referred to and other acts of Congress relating to the Osages are proper to be taken into consideration in construing the above Section 7.

Section 3 of the Act of Congress of June 28, 1906 (34 Stat. L. 543), relates to the leasing of the mineral lands belonging to the Osage Tribe of Indians, and provides:

"That such leases may be made by the Osage Tribe of Indians, through its Tribal Council, with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe."

The first subdivision of Section 4 of said act provides for the payment of moneys due as interest to members of the Osage Tribe of Indians, and provides that the minor's money shall be paid to the parents until the minor arrives at the age of twenty-one years. No attempt is made to give to the Secretary of the Interior any control whatever over moneys paid to the members of the tribe, except in case of minor members, when the payment of the minor's share to the parent may be withheld if the parent is misusing or squandering the same. If it had been intended that the Secretary might circumscribe the authority of the allottee in making leases on his lands, by rules and regulations, evidently Congress would have said so, as it did say with reference to the making of mineral leases, or some control would have been provided for, as in the case of

parents who misused or squandered their children's annuities.

The Osage Allotment Act evidently was intended to cut just as many strings loose from the Osage Indian as was possible to cut loose, and his immense property rights made it unnecessary to throw around him the same absolute protection and guardianship of his property that exists among other Indian tribes.

Congress, in dealing with other Indian tribes, with reference to the making of leases on their lands, has seen fit to provide that the Secretary of the Interior shall control such leasing by rules and regulations.

Section 3 of the Act of February 28, 1891, amending the General Allotment Act of 1887 (26 Stat. L. 795), provides as follows:

"That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age, or other disability, any allottee under the provisions of said act, or any other act or treaty, cannot personally and with benefit to himself, occupy or improve his allotment, or any part thereof, the same may be leased upon such *terms, regulations* and *conditions* as shall be prescribed by such Secretary, for a term not exceeding three years, for farming or grazing, or ten years for mining purposes."

Section 19 of the Act of Congress of April 26th, 1906, relates to the Choctaw and Chickasaw Nations of Indians, and provides as follows:

"Provided, however, that such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such *rules* and *regulations* as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or

age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations."

Section 2 of the Act of Congress of May 27th, 1908, reads as follows:

"That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor, or incompetent, for a period not to exceed five years, without the privilege of renewal; provided, that leases of restricted lands for oil, gas, or other mining purposes, and leases of restricted lands for periods of more than five years may be made, with the approval of the Secretary of the Interior, *under rules and regulations provided by the Secretary of the Interior, and not otherwise.*"

Apparently Congress, in dealing with the other Indian tribes in matters concerning the leasing of their lands, provided that the same should be done in accordance with the rules and regulations prescribed by the Secretary of the Interior; and in dealing with the Osages, Congress provided that the leasing of the mineral lands belonging to the tribe, should be in accordance with the rules and regulations prescribed by the Secretary of the Interior; but in dealing with the matter of the right of the Osage Indians to lease their allotments for farming or grazing purposes, not only omitted to provide that the same should be done in accordance with the rules and regulations, but provided unequivocally that such leases should be subject *"only"* to the approval of the Secretary of the Interior.

That the Secretary of the Interior understood Section 7 of the Act of Congress of June 28th, 1906, to give

greater rights to members of the Osage Tribe of Indians in the matter of leasing their lands for farming and grazing purposes, is evidenced by the following letter from the First Assistant Secretary, dated July 6th, 1912:

"Department of the Interior.
Washington.

July 6, 1912.

Land Contracts. R. J. H. Osage Leasing.

Mr. Homer Huffaker,
Fairfax, Oklahoma.

Sir:

The Department has received, by reference from Major McLaughlin, your letter of June 16, 1912, regarding leases made by Osage Indians and the payment of the rentals to the lessors direct.

The Department appreciates the difficulties to which you refer. The trouble, however, is not due to the regulations, but to the law which authorizes Osage Indians to lease their allotments.

Section 7 of the Act of June 28, 1906 (34 Stat. L. 539, 546), provides:

'That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease such lands for farming, grazing or other purposes not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof; PROVIDED, That parents of minor members of the tribe shall have the control and use of said minor's lands, together with the proceeds of the same, until said minors arrive at their majority; AND PROVIDED FURTHER, That all leases given on said lands for the benefit of

the individual members of the tribe entitled thereto, or for the heirs, shall be subject only to the approval of the Secretary of the Interior.'

This law gives the Osage Indians much more extensive privileges with respect to the leasing of their land and control of the proceeds than the laws generally in force regarding other Indian lands.

Respectfully,

(Signed) SAMUEL ADAMS,
First Assistant Secretary."

As stated before, Congress had some definite purpose in view in using the word "only," and no other purpose can be ascribed to the use of this word than that it was intended that the Indian should be permitted to make his own contracts concerning the leasing of his lands, in his own way, and on his own terms, without being restricted or circumscribed by rules and regulations, subject *only* to the Secretary's approval.

It is contended that the powers conferred upon the Secretary of the Interior by the general Acts of Congress are sufficient to authorize him to make rules and regulations governing the leasing for agricultural purposes of Osage lands, then we still say that the very language of said Section 7, *supra*, is of such a nature and import as to negative the idea that Congress intended that the general powers of the Secretary might be brought into play in the way of making rules and regulations.

We don't deem it necessary here to discuss or cite authorities on the proposition that the Secretary of the Interior may only make such rules and regulations as are authorized by statute, for the reason that it is a matter that has been so often threshed out and passed upon by this court and others, that it will not be disputed,

we take it. If, then, our position is correct, that no authority was given by the Osage Allotment Act to the Secretary of the Interior to promulgate rules and regulations, and that he has no authority to do so, then whatever rules and regulations he might make would not be law, and would not be compulsory upon the allottee or the lessee to follow, and if the allottee or the lessee did not follow the rules and regulations promulgated by the Secretary of the Interior in this regard, there would be no violation of law, and there would be no cause for injunction on that account, and the appellee in this case would have no right to an order of injunction preventing the making of leaess not in conformity with the rules and regulations.

We admit that in cases where the Osage Indian had not received a certificate of competency, leases made by him on his allotted lands would be void unless approved by the Secretary of the Interior; and where the Indian had received a certificate of competency, leases made by him on his homestead allotment would be void unless approved by the Secretary of the Interior; and we also admit that the appellee would have the right, in cases where a lessee undertakes to take possession, or does take possession of allotted land under void leases, to obtain a writ of injunction, enjoining such lessee from the use and occupancy of such lands, but the duty of the Government to act commences when the lessee undertakes to take possession of land under void leases, and not when the contract or lease is being made.

Congress has specifically given to the Indian the right to make the lease, which carries with it, of course, the right of a white person to enter into a lease with the Indian. They have a right to get together upon

such terms as they may see fit, and to draw such contract as they may agree upon. Before attempting, however, to take possession of the lands embodied in a lease, they must seek the Secretary's approval. Clearly, the Secretary has no duty to perform, or authority over the matter, until after the lease contract is made between the allottee and the lessee, and the same is either submitted for approval to the Secretary of the Interior, or the lessee attempts to take possession of the land without the Secretary's approval.

If this is the correct position on the law, then so much of the decree of the court as is intended to enjoin the appellants from entering into leases with members of the Osage Tribe of Indians is error and ought to be reversed; and the Osage Indians ought to be given the right to handle their own affairs with reference to their lands, as is provided in the Osage Allotment Act of June 28, 1906.

ERRORS No. 7 and 8.

Seventh. The Court erred in not holding in favor of appellants, and in decreeing that leases made by the parents of Osage minor allottees, where one parent is a white person and not a member of the tribe, and the other parent is a member of the tribe and having a certificate of competency, are invalid unless approved by the Secretary of the Interior, and in affirming the judgment of the lower court enjoining the appellants from occupying or leasing such lands without such approval. (Record p. 71.)

Eighth. The Court erred in affirming the decree of the lower court against appellants and holding that the lease held by appellants upon lands allotted to

minor members of the Osage Tribe of Indians, which leases were executed by the mothers of said members, the mothers being white persons and non-members of the tribe, and the fathers of said members being dead, were invalid, without the approval of the Secretary of the Interior, and erred in granting an injunction in said cause. (Record p. 71.)

Referring again to Section 7 of the Act of June 28, 1906, *supra*, it will be noted that the same provides:

"That parents of minor members of the tribe shall have the control and use of said minor's lands, together with the proceeds of the same, until said minors arrive at their majority."

This language is a proviso to the main part of the section. There is then this further proviso:

"That all leases given on said lands for the benefit of the *individual members of the tribe entitled thereto*, or for their heirs, shall be subject *only* to the approval of the Secretary of the Interior."

The language of this last proviso would indicate that it had special reference to the first part of Section 7, because the language is largely identical. The first part of the section specifies that the lands are *set apart for the sole use and benefit of the individual members of the tribe entitled thereto*. The last proviso above quoted says that *leases given on said lands for the benefit of the individual members of the tribe entitled thereto* shall be subject only to the approval of the Secretary of the Interior. "The individual member of the tribe entitled thereto" means undoubtedly the allottees, and in the case of parents, does not mean the parent of the minor, even though the parent be an allottee. We therefore urge that a lease by parents, of the minor's lands, need not be made in accordance with the rules and regulations

or be approved by the Secretary of the Interior. Involved in this controversy are several classes of parents, to-wit:

First. Indian parents who have not certificates of competency.

Second. Indian parents who have certificates of competency.

Third. Parents, where one of them is a white person, and the other an Indian with a certificate of competency; and,

Fourth. White parents, where the Indian parents are dead.

If the language of the statute would warrant it, there would be much reason in holding that where the parents have not certificates of competency, leases on the lands belonging to the minor children of such parents must be made in conformity with the rules and regulations, subject to the approval of the Secretary of the Interior; but it seems clear from the language of the statute, that the provisions of the first proviso are not subject to the provisions of the last proviso, and that the last proviso only has reference to the first part of the section. That a lease made by a white parent could not, it seems, under any construction of the statute, be held to be subject to the approval of the Secretary of the Interior, as it is not for the benefit of a member of the tribe, and when one parent is dead, we contend the other parent, under the law, is entitled to the use and benefit of the minor's lands; that if the living parent is white, the lease is valid without approval by the Secretary; if one dies, the estate continues in the other, analogous to estates in entireties (*Beddingfield* v. *Estill*

et al., 100 S. W. 108); and where the lease is made by a white parent, and there is also an Indian parent living, and the white parent alone makes the lease—the same not being joined in by the Indian parent, but is not resisted by the Indian parent, and is acquiesced in by such Indian parent—then there would be no necessity for approval by the Secretary of the Interior, and the United States would have no right to interfere with the possession of the lessee under such circumstances.

The Department have construed Section 7 of the Allotment Act, which provides that parents of minor members of the Osage tribe shall have control and use of the minor's land, together with the proceeds of the same, and have held for several years last past, that where one parent is dead, the living parent is entitled to the use and rentals of said minor's land; and under Departmental rules and regulations, the living parent makes the lease on said minor's lands. (*Levindale L. & Z. Co.* v. *Coleman*, 241 U. S. 60, Law Ed. p. 1080). In the opinion on page 1082, the court says:

"The provisions of the Allotment Act must be construed in the light of the policy they were obviously intended to execute. It was a policy relating to the welfare of Indians—wards of the United States. This policy did not embrace white men—persons not of Indian blood—who were not, as Indians under national protection, although they might inherit lands from Indians; and with respect to such persons, it would require clear language to show an intent to impose restrictions."

The language of the act is plain, and to our minds does not evince any intention to require the approval of a lease made for the benefit of a white person.

The seventh subdivision of Section 2 of said Act of Congress of June 28, 1906, provides for the issuance

of certificates of competency by the Secretary of the Interior, to members of the tribe making application for the same, and further provides:

"That upon issuance of such certificates of competency, the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control and dispose of his or her lands the same as any citizen of the United States."

It would seem, by this language, that Congress intended that where a certificate of competency was issued to a member of the tribe, that such member was given greater liberties and greater rights with reference to handling his own affairs, than in cases where such certificates of competency were not issued, and it would be inconsistent to suppose that Congress intended that a parent who had a certificate of competency might have full management and control of his own allotted lands, but that his management and control of his children's allotted lands, particularly the matter of making leases thereon, should be subject to the approval of the Secretary of the Interior, and such rules and regulations as he might make.

However, as hereinbefore suggested, the Osage Allotment Act referred to was intended to afford opportunities to the members of the Osage Tribe to become used to handling their own business affairs, unrestricted and uncontrolled, and the same principl eis involved in the matter of the leasing of the minors' lands by the parents. The parent is not permitted to dispose of the lands. They remain the property of the minor. The parent is given the use, control and benefit of the minor's lands until said minor arrives at majority. He cannot lease them beyond the majority of the minor. Later, Congress, by Section 2 of the Act of April 18, 1912 (37 Stat. L. 86), in dealing with the question of

the minor Osage Indian estates, in the latter part of the section, uses this language:

"Provided, that no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents."

Evidently Congress had in mind in the enactment of this legislation that the parents had control of the estate of the minors, both the income as annuities and royalties, and the income from the lands, and if such parents were misusing or wasting the same, or if the estate was permitted to deteriorate in value, then it was made possible to have a guardian appointed over such estates. This provision is inconsistent with the contention of the Government that leases on said minors' lands, when made by the parent, is subject to the approval of the Secretary, and to his rules and regulations. The right to appoint a guardian over the estate of the minor, because of waste and misuse of the minor's estate by the parent, is inconsistent with the idea that the Secretary has control over said minor's lands. We do not think it was intended by said Section 7 of the Osage Allotment Bill that the Secretary should have any control whatever over leases made of minors' lands, but that the same may be made by the parents without regard to the approval of the Secretary, and this action will not lie, and the injunction granted in this case cannot stand as against such leases. We think the reason for this, however, is stronger with reference to white parents and parents having certificates of competency, but Congress has seen fit to give to all parents of minor Osages the right to lease their lands without any control or right of approval in the Secretary of the Interior—his authority being limited to leases made on the allottee's own land by the allottee.

ERRORS Nos. 12 and 13.

Twelfth. The Court erred in affirming the decree of the lower court in holding against the appellants and in favor of the appellee in enjoining appellants from using or occupying the Northeast Quarter of Section Fifteen (15) Township Twenty-eight (28), Range Six (6) Osage County, Oklahoma, and in holding the lease of the appellants invalid on said land without the approval of the Secretary of the Interior, and erred in affirming the lower court, and in holding that the will of Jack Wheeler, which will was duly approved by the Secretary of the Interior and filed for probate, was not a removal of restrictions upon the alienation of the lands, and erred in holding that the United States had any interest in said lands which would warrant appellee in maintaining the suit, and erred in affirming the judgment of the lower court and holding that the devisee under said will, she being a non-competent member of the Osage Tribe of Indians, acquired said lands subject to the restrictions provided for in the Act of Congress of June 28, 1906, against the alienation and that said devisee could not deal with said lands or alienate same without the approval of the Secretary of the Interior. (Record p. 72.)

Thirteeth. The Court erred in affirming the decree of the lower court against the appellants and in favor of the appellee, enjoining the appellants from occupying or using, or in any manner dealing with the Northeast Quarter of Section Nine (9), Township Twenty-five (25), Range Seven (7), described in the bill, without the consent or approval of the Secretary of the Interior, and erred in holding that the United States had any authority or interest in said lands sufficient to maintain this suit, and erred in holding that lands allotted to the heirs of deceased members of the Osage Tribe of Indians were in any manner restricted, or that the heirs at law could not alienate the lands without the approval of the Secretary of the Interior, and erred in holding

that the restrictions against alienation under the Act of Congress approved June 28, 1906 (34 Statute at Large, page 539) applied to such lands, and the Court further erred in affirming the decree of the lower court in holding that the will of Kah-wah-c, which will was duly approved by the Secretary of the Interior and duly probated in the County Court of Osage County, Oklahoma, and the estate administered upon under Act of Congress of June 28, 1912 (37 Statute at Large, page 36), by the terms of which will and by the judgment of the County Court of Osage County, Oklahoma, the lessor of the above described lands acquired same, was not a removal of restrictions, and that the lessor of said lands could not deal with same without the approval of the Secretary of the Interior, and that a lease by the devisee of said lands under said will to the appellants was void unless approved by the Secretary of the Interior; that under the Act of Congress approved April 18, 1912 (37 Statute at Large, page 36), the Secretary had authority to prescribe terms or require the testator to incorporate a clause in the will prohibiting the devisee from alienating said lands, and erred in holding that the clause in said will had the legal effect of preventing the devisee from legally conveying their interest in said property, as devised, without the approval of the Secretary of the Interior, and erred in holding that the clause in said will No. 15 was of any force or effect whatever. (Record p. 72.)

We will consider these assignments together, because the lands devised in the Kah-wah-c will were lands allotted to the heirs of Walter Florer, deceased. There are two wills: the Jack Wheeler will and the Kah-wah-c will, both executed by non-competent members of the tribe; that is, members not having received certificates of competency, and the difference in the wills is that in the one the lands devised were allotted to a living member, and in the other, allotted to the heirs of

a deceased member; and in the Kah-wah-c will there is a clause, to-wit, Section 15:

"All devises of real estate made hereunder are made subject to the condition that said real estate shall not be incumbered or alienated without the consent of the Secretary of the Interior."

The Wheeler will has no limitation upon alienation. We think the learned trial judge and the Circuit Court of Appeals were in error in holding that a will duly approved by the Secretary of the Interior is not a removal of restrictions, but in effect simply a designation of the successors of the deceased, in lieu of those to whom the land would descend under the laws of the state. We urge that a will, approved by the Secretary, is an alienation, with his approval and consent, and as a matter of law amounts to a removal of restrictions.

We further urge that the court erred in holding that the limitation on alienation in the Kah-wah-c will was of any force or effect, conceding the Secretary of the Interior had the authority, under the Act of Congress of 1912, or was empowered to prescribe limitations as to alienation, and further, that the court erred in holding that the Secretary of the Interior has the power to prescribe terms as to alienation under said act.

Evidence, Record p. 38, par. 16.
Evidence, Record p. 40, par. 17.
Memorandum, Record p. 50, par. 16 and 17.
Decree, Record pp. 58 and 59.

Lands allotted to heirs of a deceased member of the tribe, we contend are unrestricted.

Walter Florer lands: Status of, see:
Evidence, Record p. 40, par. 17.
Memorandum, Record p. 50, par. 17.
Decree, Record p. 59.

The Wah-shah-me-tsa-he lands are also in this class.

Evidence, Record p. 37, par. 15.
Memorandum, Record p. 49, par. 15.
Decree, Record p. 57.

The Act of Congress of April 18, 1912 (37 Stat. L. p. 86, Sec. 8), provides:

"That any adult member of the Osage Tribe of Indians, not mentally incompetent, may dispose of any or all of his estate, real, personal or mixed, including trust funds, from which restrictions as to alienation have not been removed by will, in accordance with the laws of the State of Oklahoma; Provided, that no such will shall be admitted to probate, or have any validity unless approved before or after the death of the testator, by the Secretary of the Interior."

The following authorities hold that a will is an alienation:

Taylor v. *Parker*, 235 U. S. 42, 59 L. Ed. 121.
Hayes v. *Barringer*, 168 Fed. 221, 93 C. C. A. 507.
Coachman v. *Sims*, 129 Pac. 845.

Words and Phrases, Volume 3, 1st Ed. Vol. 2, 2nd Ed., defines "dispose of" as follows: "'Dispose of' means to alienate to effectually transfer."

U. S. v. *Hocker*, 73 Fed. pp. 292 and 294.

"The word 'dispose' as used in the provision of a will, giving property to the wife to use and dispose of the same, as she may think proper, includes a conveyance absolute and in fee simple."

Woodbridge et al. v. *Jones et al.*, 67 N. E. 878, says:

"'Dispose of' means to part with, to relinquish, to get rid of, to effectually transfer."

The same act provides that no lands or moneys inherited from an Osage allottee shall be subject to, or be taken or sold, to secure the payment of any indebtedness incurred by an heir, prior to the time the lands or moneys are inherited. In considering this section of the act, our state district courts have held that a devisee is not protected by said exemption, as he takes not as an heir but acquires the property in a different manner, and the property which the devisee acquires is subject to the payment of his debts. The Comptroller of the Currency held in effect the same, *In re Thos. Mosier Estate*, Vol. 22, Comptroller's Opinions, p. 457.

The restrictions in the original Allotment Act of 1906, we urge, run only against the land selected by living members and their heirs, and the disposal of such lands by the allottee by will, with the approval of the Secretary of the Interior, is an alienation, and as effectual as a deed of conveyance made by the allottee, with the approval of the Secretary of the Interior. That in order to restrict said lands in the hands of the devisee, it would be necessary for Congress to say in the act authorizing the disposal of the lands by will, and in the absence of such a provision, the lands pass to the devisee unrestricted.

Bledsoe's Ind. Land Laws, 2d Ed., Sec. 62, says:

"As a general rule, and unless definite provision is made therefor by statute, tribal lands are not alienable, except to the United States, or with their consent. On the contrary, all allotted Indian lands which are not subjected to restrictions upon alienation, pass to the allottee free from such restrictions, and with full power of alienation.

"He who would assert that tribal lands are alienable must find legislative authority therefor. He who

would assert that allotted Indian lands are inalienable must be able to point to the agreement or statute, which either in express terms or by fair implication, restricts alienation. In other words, with tribal lands the rule is that they are inalienable; with allotted lands, that they are alienable.

"Much misapprehension in the interpretation of the allotment agreements and statutes has arisen from the assumption that allotted lands may not be alienated without express authority to that end, and while in reason and under authority, the rule is the reverse; that is, that they may be alienated unless legislative authority is found expressly, or by necessary implication, limiting or restricting such alienation."

The members of the Osage Tribe of Indians have all received deeds for their allotments, and they are the owners in fee simple of the lands, with limitation only against alienation, without the approval of the Secretary of the Interior, and subject to the mineral rights in the Osage Tribe of Indians. We maintain that all restrictions against alienation as to the allottee or his heirs do not apply to a devisee under a will, and as said by Bledsoe, "In the absence of legislative authority restricting alienation" such devisee may alienate the lands so taken by him without the approval of the Secretary of the Interior. We may say in passing that the Interior Department, up until the judgment of the Federal Court in this case, were of the opinion and held that a will was in effect a removal of restrictions, in that it was an alienation of property with the approval of the Secretary of the Interior, and that a devisee acquiring such property, although a non-competent member of the tribe, could alienate said property without the approval of the Secretary of the Interior. This question was submitted to them in the Mosier estate

above mentioned, and a deed submitted for approval, and the Secretary of the Interior held in that case, several years ago, that it was unnecessary to approve the deed made in that case, and in fact that he had no right to approve it, because the lands passing by will, duly approved, became unrestricted in the hands of the devisee. The question was later again submitted to the Secretary of the Interior, and the Department, after investigation, again passed upon the question, holding the same.

Rev. Laws Okla. of 1910, provides:

"Property is acquired, first, by occupancy; second, by accession; third, by transfer; fourth, by will, and, fifth, by succession."

In the case of *McCullough* v. *Smith*, 243 Fed. 823, in speaking of a mortgage executed by an Indian, with the approval of the Secretary of the Interior, the court said:

"If this mortgage had gone to foreclosure, it would have ultimately resulted in a complete alienation, and in this way the Secretary of the Interior approved a complete alienation, if it took place."

With reference to the clause in the Wah-wah-e will, we say, first, that the Secretary of the Interior was not empowered to insert such a clause in the will; second, if he was, or if the testator inserted such clause, that the same is merely directory, and that a violation thereof by the devisee, is of no consequence; that under said will the devisee takes a fee simple title, and that the particular clause is neither a limitation nor a condition, third, that conceding a limitation or conditon might be inserted in a will legally, we say that one that is inserted in this will is a nullity. On the proposition of

the authority of the Secretary of the Interior to insert such a clause in a will, we think the decision on the question of leasing, hereinafter cited, is applicable to this proposition, and as said in *Jennings* v. *Wood*, 192 Fed. 507, 112 C. C. A. 657:

"The jurisdiction of the Secretary of the Interior is only that expressed in the Acts of Congress."

On the proposition that the clause in the will is neither a limitation nor a condition and that the estate vests in fee simple in the beneficiary of the will, see:

4 Kent's Com. p. 126.
Conger v. *Love* (Ind.), 9 L. R. A. p. 65.
Fowlkes v. *Wagner*, 46 S. W. p. 586.
De Peyster v. *Michel* (N. Y.), 57 Am. Dec. 470.
Smithsonion Inst. v. *Meech*, 169 U. S. 398, 42 L. Ed. 793.

Section 6605 Rev. Laws Okla. provides:

"The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except as provided in Section 6608."

In construing a statute identical with the Oklahoma statute, in the case of *Fowler* v. *Duhme* (Ind.), 42 N. E. 623, the court said:

"Under the statute prohibiting the absolute power of alienation for a longer period than the duration of a life or lives in being at the creation of the estate, a provision in the devise in fee that the land should not be alienated for a stated number of years, which does not depend on the duration of any life or lives in being, and which is imposed merely for the supposed benefit of the devisee, is void."

We submit that the estate taken by the devisee under the Kah-wah-e will is in fee simple, and any clause attempting to restrict alienation is repugnant to the estate, and void.

Schouler on Wills, 5th Ed. Vol. 1, Secs. 598-602.
Devlin on Deeds, Vol. 2, Sec. 965.
Latermer v. *Waddell*, 3 L. R. A. (N. S.) 668.
Potter v. *Couch*, 141 U. S. 296, 35 Law Ed. 722.
Chappel v. *Frick*, 179 S. W. 203.

On the question as to whether or not lands allotted to the heirs of deceased members of the tribe are restricted, we call the court's attention to Section 1 of the Osage Allotment Act (34 Stat. at L. 539), which provides *inter alia*:

"That the roll of the Osage Tribe of Indians, as shown by the records of the United States in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said rolls on January first, nineteen hundred and six, and all children whose names are now on said rolls, but who were born to members of the tribe whose names were on the said roll January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is declared to be the roll of said tribe, and to constitute the legal membership thereof."

The name of Walter Florer was on the roll January 1, 1906, and he would have been entitled to have received an allotment under the act passed June 28, 1906, had he lived until the deeds of conveyance were made to him under said act, but having died prior to the passage

of said act, the allotments he was entitled to were made and deeds of conveyance issued to his heirs. This is the land in question which is devised in the Kah-wah-e will. The other lands, to-wit: The Wah-shah-me-tsa-he lands, were allotted to the heirs of the deceased, who died after the passage of the Act of June 28, 1906, and before she had selected any lands under the provisions of said act. The only restrictions upon alienation found in the Allotment Act are in the fourth subdivision of Section 2, as follows:

"Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and a certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and non-taxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided."

In the act it is thereafter provided for the issuing of a certificate of competency, and upon the issuing thereof the surplus lands become alienable. The act provides for the living members selecting the lands, and the restrictions against alienation under the plain terms of the act apply only to the lands selected by a living member and allotted to him in his own right. We do not believe it can be said that the act imposes restrictions upon alienation of this class of land, or that Congress intended to give a living member a homestead of 160 acres, non-taxable and inalienable until otherwise provided by Act of Congress, in his own right, and at the same time give the heirs of a deceased member 160 acres of land as a homestead of like kind and character. The Supreme Court of Oklahoma has passed upon this ques-

tion and construed the Osage Allotment Act in two cases:

Kenney v. *Miles*, 162 Pac. 775.
Fowler v. *Rogers*, 167 Pac. 635.

In the former, the court says:

"Act Cong. June 28, 1906, c. 3572, 34 Stat. at L. 539, placed no restrictions upon the alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interests therein reserved to the tribe, individual disposition of which is expressly inhibited."

Levindale Lead & Zinc Mining Co. v. *Coleman*, 241 U. S. 432.
Muller v. *United States*, 224 U. S. 448.
Skelton v. *Dill*, 235 U. S. 206.
Reed v. *Welty*, 197 Fed. 419.
Rentie v. *McCoy*, 35 Okla. 77, 128 Pac. 244.
Woodard v. *DeGraffenreid*, 238 U. S. 284.
Sizemore v. *Brady*, 235 U. S. 441.
Hancock v. *Mutual Trust Co.*, 24 Okla. 391, 103 Pac. 566.

In *Parkinson* v. *Skelton*, 33 Okla. 813, 128 Pac. 131, the Court holds:

"The word 'allottee' refers to parties to whom allotment is made. It cannot be well urged that a member of a tribe becomes an allottee until he selects his allotment. Prior to that time he is not an allottee; subsequent to that time he is, as to the lands set apart to him, an allottee."

Bledsoe v. *Wortham*, 35 Okla. 261, 129 Pac. 841.

ERRORS Nos. 9, 10 and 11.

Ninth. The Court erred in affirming the judgment of the lower court in enjoining the defendants from

dealing with lands allotted to Walter Harvey upon which the appellants have a lease from a white person owning an undivided one-half interest therein and a non-competent Indian owning the other one-half interest, which lease was not approved by the Secretary of the Interior, and erred in holding that appellants could not use any part of said lands.

Tenth. The Court erred in affirming the decree of the lower court against the appellants and in favor of the appellee, enjoining appellants from in any manner dealing with or occupying any portion of the lands in which appellants own undivided interest without a lease duly approved by the Secretary of the Interior from their tenants in common who are non-competent Indians.

Eleventh. The Court erred in affirming the judgment of the lower court, enjoining the appellants from occupying or in any manner dealing with their undivided interest in lands allotted to a non-competent member of the Osage Tribe of Indians, where such member died leaving competent and non-competent heirs at law, the appellants having purchased the interest of the competent heirs, the same being a four-ninths interest in said lands, and which land was the subject of a partition suit pending in the District Court of Osage County, Oklahoma, at the time the injunction was granted, and erred in holding that the appellants could not in any manner deal with any interest in said lands by way of using or leasing their interest without a lease approved by the Secretary of the Interior.

Under these assignments, which we will consider together, as we think the authorities applicable to all, and we call the court's attention to the following lands: The Walter Harvey lands were owned by R. C. Drummond, a white man, and Mary Harvey, a non-competent Indian, equally, as tenants in common. The owners of the lands executed a lease to the defendants, but the lease

of Mary Harvey, the non-competent, was not approved by the Secretary of the Interior. The defendants were in possession, with the consent of the owners of the lands, and the court restrained the defendants from in any manner dealing with the undivided one-half interest of the non-competent, without the approval of the Secretary of the Interior.

Evidence, Record p. 34, par. 7.
Memorandum, Record p. 47, par. 7.
Decree, Record p. 53.

The Hunt lease was upon lands owned by Antwine Hunt, a non-competent member of the tribe, who inherited an undivided one-half interest in said lands from his deceased child, and his wife inherited the other one-half interest, unrestricted. She sold her half interest, and Antwine Hunt subsequently purchased the half interest, thereby owning all of the lands; an undivided one-half interest was unrestricted. The defendants leased from Antwine Hunt, the lease being unapproved by the Secretary of the Interior. The defendants were enjoined from in any manner dealing with the restricted half interest.

Evidence, Record p. 35, par. 8.
Memorandum, Record p. 48, par. 8.
Memorandum, Record p. 54.

The Wy-u-hah-kah lands were partly restricted and partly unrestricted, and a partition suit was pending in the District Court of Osage County, Oklahoma, prior to the institution of the injunction suit by the United States, as was also pending in the County Court of Osage County, Oklahoma, the estate of Andrew Penn, the owner of a portion of said lands. The defendants were the owners of a four-ninth's interest in said lands, and were

in possession of the same and using the lands, and were able, ready and willing to pay the other tenants in common their share of the usable or rental value of said land. The court restrained these defendants from occupying or using the premises, or any part thereof, without the approval of the Secretary of the Interior.

Evidence, Record p. 36, par. 12.
Memorandum, Record p. 48, par. 12.
Decree, Record p. 55.

The Wah-tsa-moie lands were allotted to the heirs of this party, and were owned by the defendants, LaMotte & LaMotte, owning a one-third interest; Martha Pryor, an adult incompetent, owning a one-third interest, and her minor child, Michael Wah-tsa-moie, owning a one-third interest.

Evidence, Record p. 37, par. 13.
Memorandum, Record p. 49, par. 13.
Decree, Record p. 56.

Martha Pryor consents to the defendants using this land, and the defendants are paying her her portion of the rental, and the court enjoins the defendants from using said lands or any portion thereof, or in any manner dealing with said lands or any part thereof.

In all of the above cases, the court will note that there are unrestricted interests, and the defendants either were the owners of the unrestricted interests or the lessees of such owners, and the rule applicable to tenants in common is applicable in these cases, notwithstanding some of the interests are restricted. In the case of the Hunt lease, it is unquestioned that he could lease an undivided one-half interest in the premises without the approval or consent of the Secretary of the Interior, and he leased this undivided one-half interest

to the defendants and was not complaining about their occupancy of the premises, and we submit as a proposition of law, if he did not desire to lease the other one-half interest through the Department, he was not compelled, under the law, to do so, and the Secretary of the Interior could not compel him to do so; and the defendants, having a valid lease on the undivided half interest, had a right to occupy the premises, especially with Hunt's consent, and the injunction should not have been granted. Each tenant in common is entitled to occupy the premises, and one cannot exclude the other by injunction. The only authority the Secretary of the Interior had was to approve or disapprove any lease that Hunt might submit.

38 Cyc., pp. 17 and 18:

"Each tenant in common is equally entitled to the use, benefit and possession of the common property, and may exercise acts of ownership in regard thereto, the limitation of his right being that he is bound to so exercise his rights in the property as to not interfere with the rights of his co-tenant, and neither an action at law nor in equity can ordinarily be maintained between co-tenants for the exclusive possession of the common property, or for the sole enjoyment of the profits thereof, even though the one in possession refuses to deliver sole possession to his co-tenant, or defendant forcibly took it from plaintiff's possession. If a tenant in common desires to have sole and exclusive possession of his interest in the common property, he can only seek his remedy in partition. It is competent for tenants in common to agree among themselves that one of them shall have sole or exclusive possession of the common property, and such an agreement is valid and enforceable."

38 Cyc., pp. 104 and 105:

"A tenant in common may lease his share of the common property, and the lessee, on entry, will have the same right in relation to the other co-tenant that his lessor had."

There is no charge of fraud or unfair dealing with the noncompetent tenant in common.

The evidence shows that the co-tenants of the defendants were not in any way being injured or objecting to the occupancy or use of the premises by the defendants, and that the defendants were ready, able and willing to account to their co-tenants for rent money or profits. No evidence showing that the noncompetent Indian tenants were in any way being interfered with, and the injunction had the effect of depriving the defendants of the use of the property in which they owned an interest, and placed upon them the burden of procuring an approved lease from the Secretary of the Interior on the interest of their noncompetent Indian co-tenant. We urge that the injunction enjoining the defendants from occupying their own property, or in any manner dealing with property they had an interest in, is depriving them of property without due process of law, and placing it within the power of the Secretary of the Interior to do so, by refusing to approve a lease to them or to their lessee. It will not do to say that the Secretary of the Interior will not act arbitrarily and refuse to approve a lease to a white man who owns an undivided interest in lands, where he is willing to pay the reasonable rental value thereof.

The question is, can the courts legally put this requirement upon a man who owns an interest in lands, and say to him that he cannot occupy them unless his noncompetent tenant in common submits a lease to the

Secretary of the Interior for approval and the Secretary of the Interior approves such lease. The facts are, that in this case the Department refused to approve leases either to the defendants or to their lessees, and the injunction had the effect of forcing the defendants to lease their lands to whomsoever the Secretary of the Interior might see fit to approve a lease. The act of Congress does not give the Secretary of the Interior jurisdiction to initiate a lease, and we maintain that the lessee, being a noncompetent Indian, who owns interest in lands which he cannot alienate, with a white tenant in common, whose interests are alienable, can make an arrangement whereby the white tenant can occupy the premises without the consent of the Secretary of the Interior; and that in cases where white tenants in common with noncompetent Indian tenants in common are using lands of this class and character, with the consent of their noncompetent Indian tenant in common, neither the Secretary of the Interior nor the United States has any authority to interfere simply because the white tenant in common or his lessee has not procured an approved lease upon the restricted interest of the other tenant in common.

Under the Act of Congress of June 28, 1906, it is provided that the members or their heirs shall have the right to use and to lease the lands for farming and grazing purposes, and said members shall have the full control of the same, including the proceeds thereof. Certainly this does not preclude a member of the tribe from obtaining the benefits and use of his property, except by lease approved by the Secretary of the Interior, and we urge that the fact that the lease was made by the Indian upon the restricted interest, which lease was

not approved by the Secretary, would not entitle the government to an injunction, where the white tenant in common, or his lessee, was in possession of the lands with the consent of the Indian owning an unrestricted interest therein.

ERRORS Nos. 1, 5 and 6.

First. The Court erred in modifying the judgment of the United States District Court for the Western District of Oklahoma in favor of appellants, by which judgment the lower court held that a lease upon minor Osage allottee's lands made by a duly appointed, qualified guardian and approved by the County Court, was valid without the approval of the Secretary of the Interior, and in holding that such lease required the approval of the Secretary of the Interior.

Fifth. The Court erred in modifying the decree of the lower court, and affirming the decree of the lower court as modified, and in holding and decreeing that leases made by a guardian duly appointed by the County Court of Osage County, Oklahoma, and said leases being approved by said court, were invalid without the approval of the Secretary of the Interior.

Sixth. The Court erred in holding that the Osage Attlotment Act of June 28, 1906 (34 Statutes at Large, page 539), governed and controlled the question at issue in this cause, and that the Act of April 18, 1912, (37 Statutes at Large, page 86) did not affect the questions at issue and was not controlled as to the guardianship leases in question, and as to the questions upon lands acquired under will duly approved by the Secretary of the Interior under the provisions of the Act of April 18, 1912.

Errors 1, 5 and 6 deal primarily with the proposition as to what is meant by the Act of Congress of Apr.

18, 1912 (37 Stat. L. p. 86), and as to what extent said Act of Congress amended the Act of Congress of June 28, 1906 (34 Stat. L. p. 545.)

The trial court held that under the authority given in the Act of Congress of Apr. 18, 1912, supra, guardians with the approval of the County Court, could make a valid lease on the lands of orphan minors and incompetents. The Circuit Court of Appeals reverses the trial court in this matter, and to that extent, only, modifies the decree of the District Court.

As supporting appellants' position in this matter see:

Rev. Laws Okla., Sec. 6569.
Duff et al. v. *Keaton et al.*, 33 Okla. 92, 124 Pac. 291.
Bailey v. *King*, 157 Pac. 763; rehearing, p. 766.
Fisher v. *McKeeme*, 143 Pac. 850.
Bates' Guardian v. *Dunham*, 12 N. W. 309.
Los Angeles Co. v. *Winans*, 109 Pac. 649, Syls. 26-27.
Morrison v. *Burdette*, 154 Fed. 617, 83 C. C. A. 391.
Jennings v. *Ward*, 192 Fed. 507, 112 C. C. A. 657.
Midland Oil Co. v. *Turner*, 179 Fed. 74, 102 C. C. A. 368.
Turner v. *Seep*, 167 Fed. 646, 102 C. C. A. 368.

Errors 2 and 3 are necessarily covered by the foregoing arguments, and it is not necessary, as we view the matter, to submit any separate argument covering said assignments.

We therefore respectfully urge that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, should be reversed, and this cause re-

manded to said Court, with instructions to reverse the judgment of the United States District Court for the Western District of Oklahoma, and to enter judgment in favor of these appellants.

Respectfully submitted,

T. J. LEAHY,

C. S. MACDONALD,

Counsel for Appellants.

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CITATIONS.

STATUTES.

CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

GEORGE G. LAMOTTE AND ANNA MARX LAMOTTE, *appellants*,
v.
THE UNITED STATES OF AMERICA. } No. 121.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The United States brought suit in the United States District Court for the Western District of Oklahoma against George G. LaMotte and Anna Marx LaMotte to enjoin them from entering into leases with noncompetent Osage Indians, by any means or manner other than that prescribed by the Secretary of the Interior, and from using, occupying, or exercising any control over, or subleasing, any lands as to which they had procured such unauthorized leases.

The approved form of lease and the rules and regulations covering such leases, both of which it

was alleged were disregarded by these defendants, were set up as Exhibit A to the bill. R. 7–15. They were promulgated by the Secretary of the Interior pursuant to section 12 of the Act of June 28, 1906, ch. 3572, 34 Stat. 539, 545, by which the Secretary was given authority to do all things necessary to carry into effect the provisions of that Act. Section 7 of the Act provided for leasing Osage lands for grazing or agricultural purposes, but required such leases to have the approval of the Secretary.

The defendants were engaged in the business of procuring from noncompetent Osage Indians leases of lands allotted to them and subleasing to clients desiring large pastures for grazing or fields for agricultural purposes, whom they would put in possession and guarantee against any claims which might be brought against them by reason of occupancy under the subleases. The leases which the defendants procured were not in the form approved by the Secretary of the Interior, the regulations were not complied with, nor were the leases submitted to him for approval. The business thus carried on interfered with and prejudiced the Secretary of the Interior in leasing these lands under the regulations promulgated by him. So extensive had the operations of defendants become (it was alleged that they had procured leases to more than 25,000 acres) that the Secre-

tary of the Interior had notified them to desist from their practices and had informed them that leases such as they had taken would not receive his approval.

A motion to dismiss the bill of complaint was interposed (R. 15–16), the grounds of which were: (1) That the noncompetent Osage Indians for whose benefit the action was brought were not joined as parties plaintiff; (2) the lack of interest of the United States in the subject matter; (3) that the matters sought to be enjoined were authorized by law; and (4) that there was an adequate remedy at law.

This motion was denied (R. 16) and answer was then filed (R. 16–23), which, while admitting the procuring of most of the leases specified in the bill of complaint, asserted that such leases were valid, and that the Secretary of the Interior was without authority to control leases procured as these had been. Certain other leases typical of a number which had been secured by the defendants were set forth and like allegations made as to their validity and the lack of authority of the Secretary.

The answer concluded with a prayer that leases such as those taken be decreed valid; that the Secretary of the Interior be decreed to be without authority under the law to promulgate rules and regulations concerning leasing of lands of members of the Osage Tribe, and that there be a definition and determination of the rights of the Secretary

of the Interior as to approval of farming and grazing leases of lands of such members.

Upon the case presented by the pleadings and shown by the evidence (R. 23–33), the District Court found and decreed invalid, without the approval of the Secretary of the Interior, leases of the following kinds taken by the defendants (Memo. of Rulings, R. 34–38; Decree, R. 38–45):

1. Leases of allotments of minor Osages, executed by their parents, one of whom is a white nonmember of the tribe, the other a member to whom a certificate of competency had issued under the Act of June 28, 1906. Memo. of Rulings, par. 2, R. 34, 35.

2. Leases of allotments of minor Osages, executed by the surviving parent, white nonmember. Memo. of Rulings, par. 3, R. 35.

3. Lease of homestead allotment of adult member who has certificate of competency. Memo. of Rulings, par. 5, R. 35.

4. Lease of allotment of adult member to whom no certificate of competency has issued. Memo. of Rulings, par. 6, R. 35.

5. Lease of allotment of minor Osage, executed by parents, both of whom had certificates of competency. Memo. of Rulings, par. 9, R. 36.

6. Lease of allotment of minor Osage, executed by father who had certificate of competency, recognized by Secretary as proper person to make lease. Memo. of Rulings, par. 10, R. 36.

7. Lease of allotments of noncompetent adult heirs, whose decedent died intestate before selection of allotment. Memo. of Rulings, par. 15, R. 37.

8. Lease of allotment by a noncompetent Osage, the devisee of allottee under will approved by the Secretary of the Interior, legally probated. Memo. of Rulings, par. 16, R. 37, 38.

9. Lease by white man, the transferee of a noncompetent devisee who took under a will of a sole heir at law, a noncompetent Osage, containing a provision restricting alienation or encumbrance of lands devised thereunder, without approval of the Secretary of the Interior. Memo. of Rulings, par. 17, R. 38.

10. Leases by noncompetent heirs. Memo. of Rulings, pars. 7, 8, 12, 13, R. 35–37.

(Paragraph 13 covers case of permissive occupancy of portion of land, no formal lease existing. The effect of the ruling is the same as if formal lease executed.)

There were certain tracts of the whole of which defendants held possession; these were claimed by them either (1) as owners of an undivided part thereof and by lease of the balance, or (2) by lease entirely; the validity of the undivided purchased interest was not questioned, but the validity of the lease covering the balance was denied because that interest was restricted. As to those held by lease, the lease was assailed as invalid as to the undivided restricted interest only. The court held the defendants entitled to possession and occupancy as

to the undivided interest conceded or held to be valid, but not as to the restricted interest. Memo. of Rulings, pars. 7, 12, 13, R. 35–37.

The basis of these various rulings was that the lands as to which the leases were declared invalid were, under the Act of June 28, 1906, restricted and not subject to lease or alienation without the Secretary's approval.

The court further found and decreed *valid* without approval of the Secretary of the Interior, leases made:

(*a*) By a noncompetent heir, of an interest acquired from a competent or unrestricted ancestor (interest of Martha Pryor as heir of Harry Wahtsa-moie). Memo. of Rulings, par 13, R. 37.

(*b*) By a noncompetent, of an interest purchased from one who was competent to convey. Memo. of Rulings, par. 8, R. 36.

(*c*) By duly appointed guardians of minor allottees or heirs, which leases had been approved by the proper county court. Memo. of Rulings, par. 4, R. 35.

It also held as to lands claimed by one Ezell under lease duly approved by the Secretary, and which had been trespassed upon by defendants' cattle, that the lessee had a right of action and that there was no duty on the Government to sue on his behalf. Memo. of Rulings, par. 18, R. 38.

An injunction was awarded against the defendants as to leases held invalid, and it was further

decreed that they be enjoined from leasing for grazing or agricultural purposes, or dealing in leases on, using, occupying, and inclosing without the approval of the Secretary, any of the lands held restricted in the decree, and all other lands in Osage County of like situation and character, allotted to Osage Indians.

From the decree entered an appeal was filed by defendants and a cross-appeal by the Government, the latter alleging error as to the Ezell lease and as to the holding that leases by guardians, approved by the proper county court, were valid. R. 55. The two cases presented by the appeal and cross-appeal were by stipulation consolidated and briefed as one case in the Court of Appeals. R. 58.

The Circuit Court of Appeals modified the decree of the lower court and, as modified, affirmed it. R. 68; Opinion, R. 59–68; 256 Fed. 5.

The modifications were that leases by guardians approved by the County Court were invalid without approval by the Secretary of the Interior; that noncompetent Osages, regardless of the source of their title, could not lease without the Secretary's approval; that where there were undivided interests in lands, part of which were restricted, leases of such restricted interests and occupancy thereof could be had only with the approval of the Secretary of the Interior and that the use and occupancy of such undivided interests were subordinate to the preservation of the restricted estate.

The appeal of defendants brings the case to this court and presents all the questions passed upon by both courts below with the exception of the Ezell lease, which is now out of the case, as the Government acquiesced in the judgment of the Circuit Court of Appeals as to that lease.

PROPOSITION.

The decree of the Circuit Court of Appeals was right and should be affirmed.

In an endeavor to aid in the consideration of the case, we make the following classification of the lands, the right to lease which is here drawn in question:

1. Noncompetent adults, which they hold—
   - (*a*) as allottees;
   - (*b*) as heirs or devisees from (1) noncompetent, or (2) competent testator or intestate;
   - (*c*) as purchasers.
2. Minors, leased by—
   - (*a*) (1) noncompetent, or (2) competent parents who are members of the tribe;
   - (*b*) parents who are white nonmembers;
   - (*c*) guardians duly appointed.
3. Competent adults, held as homestead;
4. Lands held in common.

ARGUMENT.

The legislation respecting the Osages has been considered by this court in *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, in *McCurdy* v. *United*

States, 246 U. S. 263, and in *Kenny* v. *Miles,* 250 U. S. 58.

Both the Act of June 28, 1906, ch. 3572, 34 Stat. 539, and the Act of April 18, 1912, ch. 83, 37 Stat. 86, clearly evince the intention of Congress that broadly the Osages in their lands and tribal funds were to be restricted for 25 years.

In the *McCurdy* case, *supra,* the intent and effect of this legislation was succinctly stated (pp. 265, 266):

> Congress, concluding apparently that the enjoyment of wealth without responsibility was demoralizing to the Osages, decided upon the policy of gradual emancipation. By act of June 28 1906, 34 Stat. 539, it provided for an equal division among them of the trust fund and the lands. The trust fund was to be divided by placing to the credit of each member of the tribe his pro rata share which would thereafter be held for the benefit of himself and his heirs for the period of twenty-five years and then paid over to them respectively (secs. 4 and 5). The lands were to be divided by giving to each member the right to make, from the tribal lands, three selections of 160 acres each and to designate which of these should constitute his homestead. A commission was appointed to divide among the members also the remaining lands, after setting aside enough for county use, school sites, and other small reservations. The oil, gas, coal, and other mineral rights were reserved to the

> tribe for the period of twenty-five years with provision for leasing the same. The homesteads were made inalienable and nontaxable for twenty-five years or until otherwise provided by Congress. All other allotted lands, which were known as "surplus lands," were made inalienable for twenty-five years and nontaxable for three years, except that power was vested with the Secretary of the Interior to issue to any adult member, upon his petition, a certificate of competency, authorizing him to sell all of his surplus lands; and upon its issue all his surplus lands became immediately taxable.

The main modification of the general policy of restriction is contained in section 2 of the Act of June 28, 1906, which (in the seventh paragraph, p. 542) authorizes the Secretary of the Interior, in his discretion, to issue a certificate of competency to any adult member of the tribe by virtue of which such member may sell and convey his lands, except the homestead, and shall "have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States."

But this discretionary authority to declare competency, and the right conferred by receipt of a certificate of competency, were expressly declared not to authorize the sale of the minerals in the lands, but these minerals were reserved for the 25-year period.

The other exception to alienation is that contained in section 7 of the same Act (p. 545), which

authorizes leases; this is the enactment with which we are principally concerned in the instant case, as will appear from the discussion a little later on.

There is nothing in the Act of April 18, 1912, which indicates any intent upon the part of Congress to place the disposition or alienation of the property of the Osages beyond the jurisdiction or supervision of the Secretary of the Interior.

While section 3 of that Act provides for the placing of the property of deceased orphans, minors, insane, and other noncompetent allottees of the tribe in probate under the jurisdiction of the county courts of Oklahoma, yet the section specifically provides that no land shall be sold or alienated without the approval of the Secretary of the Interior.

All through the Act of 1912 provision is made for supervision by the Secretary of matters pertaining to the lands of these allottees, manifesting most unequivocally the purpose of Congress to have the Secretary of the Interior look after their welfare.

With this brief survey of the legislation we come to the particular part of the Act of 1906 involved in this case, namely, section 7, which reads:

> That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have

> the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: *Provided,* That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: *And provided further,* That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.

And section 12, providing:

> That all things necessary to carry into effect the provisions of this act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior.

1. Leases of lands of noncompetent adults.

(a) ***Lands which they hold as allottees.***

It is impossible to read the language of section 7 and reach any conclusion other than that the Secretary of the Interior is given control over the leasing of lands held by noncompetent adults *as allottees.* Class 1 [a], p. 8. Appellants concede this in their brief, p. 43.

(b) *Lands held as heirs or devisees.*

It is equally clear that lands held by *noncompetents as heirs or devisees* can not be leased without approval by the Secretary of the Interior.

(1) From noncompetents.

As to lands coming to such *noncompetents* from *noncompetent* decedents (class 1 [b–1], p. 8), it is plain that the power of the noncompetent heir to make a lease thereof is limited in the same way and to the same extent as that of his noncompetent ancestor. In principle no distinction exists between the two and the statute relating to the Osages recognizes none. Leases made by all noncompetent members on restricted lands stand on the same footing, regardless of the source of title. The language of the statute plainly requires the approval of the Secretary with respect to all leases given on restricted lands by or for the benefit of individual members, " or for their heirs."

As was said by this court in *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, 438:

> * * * it would be an inadmissible construction of this section [sec. 7] to say that the word "heirs " was there used in contradistinction to " members." This provision as to leases, in the light of the purpose of the act, had reference we think to the " individual members " who received allotments and the Indian heirs of such members.

(2) From competent decedents.

Regarding lands inherited by *noncompetent* heirs from *competent* decedents (class 1 [b-2], p. 8), it is argued by appellants that as a competent Osage under section 2 could use his property as a citizen he could lease without approval by the Secretary; that that privilege ran with the land and hence a noncompetent heir could do likewise.

But the whole tenor of the legislation with respect to the Osages negatives that assertion. As we have already said, the clearly expressed intent and effect were to restrict the land except as to those who received certificates of competency. Competency under the statute is a personal status; the qualifications for it are plainly expressed in the Act of 1906. To entitle a member to a certificate of competency it must appear that he has ability to transact business and to care for his individual affairs. The legislation relating to the Osages looks to the personal qualifications and not to the blood status of the individuals concerned. In this respect it differs from Acts relating to the Five Civilized Tribes, notably the Act of May 27, 1908, ch. 199, 35 Stat. 312. The determination of the question of competency is left to the discretion of the Secretary of the Interior, and the emancipation of any Osage depends upon his own personal qualifications in the particulars specified in the Act. Compare *Levindale Lead Co.* v. *Coleman*, *supra*.

A provision in the supplementary Act of April 18, 1912, is significant in this connection. Section 6 of that Act (37 Stat. 87) provides that the lands of deceased Osage allottees may be partitioned or sold under proper order of a competent court under the laws of Oklahoma, and that where the *heirs* have certificates of competency or are non-members of the tribe, the restrictions on alienation are removed. Conversely, restrictions on alienation are *not* removed in the case of heirs who do not hold competency certificates.

The fact that the lands were subject to sale and alienation in the hands of the competent members would not preclude Congress from imposing restrictions with respect to the alienation of such lands after the same have passed to a noncompetent heir. The power of Congress in this regard is well settled. *Brader* v. *James*, 246 U. S. 88, 96.

The welfare and proper supervision of noncompetent Indians has been the constant concern of Congress in its legislation, and in the absence of a clearly expressed determination to depart from such policy all doubts should be resolved in favor of the continuance of supervision.

In *Kenny* v. *Miles*, 250 U. S. 58, this court, in considering the status of heirs of Osages and their rights, and in speaking of the legislation respecting them, said (p. 64):

> Under the act of 1906 the death of a member entitled to an allotment does not

extinguish his right. According to the implication of the act and the administrative rulings, the allotment still may be made in his name. Where this is done he is regarded as the allottee and his heirs as taking by descent from him. Such allotments and all others are made under one comprehensive provision, in which there is no distinctive mention of either living or deceased members. The restrictions are imposed by another provision equally comprehensive, and it makes no distinction between lands allotted to living members and those allotted in the right of deceased members. *Nor is any such distinction made in the section dealing with descent. The heirs are generally Indians, and seldom white men. When they are Indians they are equally within the occasion for the restrictions, whether the allotment be to a living member or in the right of one deceased, Talley* v. *Burgess*, 246 U. S. 104, 108; and in either case some may be without any allotment of their own, because born after the time for closing the roll. Thus those who take under allotments made in the right of deceased members are no less within the letter and spirit of the restrictions than are other heirs. *That all are intended to be protected is shown by the leasing provision, which requires that "all leases" on the part of heirs shall have the approval of the Secretary of the Interior.*

The act of 1906 is quite unlike the earlier acts considered in the cases of *Mullen* v. *United States*, 224 U. S. 448, and *Skelton* v.

Dill, 235 U. S. 206, which are cited in support of the conclusion below. Those acts, as was pointed out in our opinions, contained separate provisions for two classes of allotments—one to members living at the time, and the other in the right of deceased members. In the provisions dealing with the first class there were express restrictions on the right of alienation, and in those dealing with the second class there was an entire absence of such restrictions. Because of this difference in terms we held that Congress intended that allotments of the second class should be unrestricted. The differences between those earlier acts and that of 1906 are pronounced and reasonably can be explained on no other theory *than that Congress intended that all allotments under the act of 1906 should be restricted, subject of course to the issue of certificates of competency.* And that this is what was intended becomes even more manifest when it is considered that in the meantime Congress had imposed other restrictions in respect of allotments under the earlier acts and in doing so had discarded the distinction before made between the two classes of allotments so far as full-blood Indian heirs were concerned. *Talley* v. *Burgess, supra.* (Italics ours.)

(c) *Lands purchased.*

Respecting interests in Osage lands held by noncompetents as purchasers from those who were competent to convey (class 1 [c], p. 8), we think the same considerations which lead to a conclusion

that noncompetent heirs of competent decedents, the class just considered, were subject to the supervision of the Secretary of the Interior would make a like conclusion necessary as to the inability of noncompetents as purchasers. As the land involved was Osage land, Congress might impose restrictions; the clear purpose as to all Osage lands was that they should be inalienable except in the hands of nonmembers or those who might receive certificates of competency. The fact that the noncompetent purchases from one competent to convey does not remove from the former the restriction which Congress imposed upon him in dealing with Osage lands. As we have already said, the personal status of the individual Osage and not the status of the land is the test of the power of conveying or leasing without supervision.

2. Leases of lands of minors.

This brings us to a consideration of leases made of lands of minors. The Act (section 7) contains this language:

> *Provided,* That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority; * * *

(a) *1. Leases by noncompetent parents.*

We first take up leases executed by noncompetent parents. Class 2 [a–1], p. 8. The same reasons for not allowing noncompetent adults to lease

would apply to the case of noncompetent parents. If the noncompetent adult must have approval of the Secretary to lease his own land, certainly he needs supervision when leasing lands of his child. The control mentioned in the section does not mean control untrammeled or without supervision.

(2) Leases by competent parents.

and

(b) *Leases of white parents, nonmembers.*

We pass to the case of competent parents, and white parents nonmembers of the tribe. Class 2 [a–2] and b, p. 8. We consider them together because their status is similar. The nonmember is unrestricted. *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432.

While these two are not subject to supervision by the Secretary with respect to their own lands, yet when dealing with the property of their children they occupy a different status. It is one thing for competent members to act for themselves, but quite another to act in a representative capacity for their noncompetent children.

The fair construction of section 7 is that it is designed to place under the supervision of the Secretary of the Interior the leasing of all lands except the lands of nonmembers or of members holding certificates of competency. In giving to parents the control of the lands of their minor children it was certainly not the intent of the statute to confer

on such parents a less restricted power to lease than the owners themselves would be under upon attaining their majority. Nor is it reasonable to suppose that it was the intent of Congress to divest such children of the protection usually incident to wardship.

It is important to note the precise language contained in the *proviso* to section 7 now under consideration, and to compare it with the other parts of the same section. The proviso reads:

> Provided, That parents of minor members of the tribe shall have *the control and use* of said *minors' lands, together with the proceeds of the same,* until said minors arrive at their majority. (Italics ours.)

The preceding part of the section reads:

> That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right *to use* and *to lease* said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have *full control* of the same, *including the proceeds thereof.* (Italics ours.)

It will be observed that the rights given the parents are the same as those given the individual members, *with this important exception—the right to lease is not given.* The words " to lease " in the

first part of the section are omitted in the proviso. We think this omission intentional and as indicating that the parents were to have only the personal control and use of the lands of their minor children for the purpose of farming, grazing, etc.

Furthermore, the regulations under this Act, promulgated by the Secretary of the Interior, specifically required that leases of minor children's lands must be approved. Section 4 of the Regulations provides (R. 13):

> Leases covering homesteads of allottees to whom certificates of competency have been issued or lands allotted to or inherited by such allottee's minor children are invalid without the approval of the Secretary of the Interior as provided in these regulations.

Light is thrown upon the purpose of Congress in respect to parental authority by the provisions of section 3 of the Act of April 18, 1912, *supra*, where, although placing the property of deceased and orphan minors, insane or other incompetents, in probate under the jurisdiction of the Oklahoma county courts, it was provided that no guardian should be appointed for a minor whose parents are living, and then came a provision that no land should be sold or alienated under the provisions of that section without the approval of the Secretary of the Interior. That proviso related clearly to property under the jurisdiction of the county courts and also to that held by parents for their minor children.

This question is further illuminated by what was said in the House of Representatives when the 1912 Act was being considered. Cong. Rec., 62d Cong. (2d sess.), vol. 48, pt. 5, pp. 4243 et seq.

In opening the consideration of the bill, Mr. Stephens, chairman of the committee reporting it, yielded to Mr. McGuire, the author of the bill and the one who wrote the report, and in effect made him chairman of the committee for the presentation of the bill. Page 4243. In the course of the discussion, which related more particularly to the question of payment of taxes upon the surplus property of the Osages, the following occurred (page 4244):

> Mr. McGUIRE of Oklahoma. The agreement with these people by the Interior Department at the time of the allotment of this land, under the Act of 1906, was that the surplus land should be taxed. There is no other way to provide for local government. I will explain that there were 656 acres of land for each one, and every acre was a sufficient guarantee for the Indians. They have about 655 acres each.
>
> Mr. MANN. How long will they have it? You can take it away from them through the taxing power.
>
> Mr. McGUIRE of Oklahoma. Just as long as the Secretary of the Interior protects them, *because there is no instance in this bill or in any bill where anything may be done with the lands and funds of those incompetent Indians without the authority from the*

Secretary of the Interior. We provide in this bill that the Secretary of the Interior may, out of the fund of the Indians now in the Treasury of the United States, pay the tax upon this land. (Italics ours.)

Mr. MANN. Where is that provision?

Mr. MCGUIRE of Oklahoma. Right here in the bill. We will reach it shortly.

Mr. MANN. I say, where is it in the bill? I would like to know.

Mr. MCGUIRE of Oklahoma. There is no interest of the Indians that is not guarded in the bill. I can find it in a second.

Mr. CONNELL. Mr. Chairman, will the gentleman yield?

The CHAIRMAN. Does the gentleman from Oklahoma yield to the gentleman from New York?

Mr. MCGUIRE of Oklahoma. Yes.

Mr. CONNELL. I would like to know in just a word while the gentleman is on that point, to clear it up, under this extended taxation that is proposed in the bill for these lands——

Mr. MCGUIRE of Oklahoma. Not extended——

Mr. CONNELL. What will become of the minors and the children of the Indians who might inherit some of it? Are they provided for, or will they become paupers, dependent on the State?

Mr. MCGUIRE, of Oklahoma. The bill absolutely protects in every detail the minors and persons who may inherit land who have Osage Indian blood in their veins *by provid-*

ing that no steps shall be taken without the approval of the Secretary of the Interior, and that is the provision now under the law of 1906. (Italics ours.)

It must be borne in mind that the legislation now under consideration forbids alienation except as expressly provided otherwise. Since a lease of property is an alienation thereof (*Parker* v. *Riley*, 243 Fed. 42, and cases cited), it is incumbent on appellants to show that the leases in question find specific sanction in the statute.

(*c*) *Leases by guardians duly appointed.*

Leases made on behalf of minors or other noncompetents with the approval only of the county court having jurisdiction of the estate or control of guardians are likewise invalid. Class 2 [c], p. 8. That is evident particularly in the light of the proviso in section 3 of the 1912 Act, since in addition to the approval of the county court that of the Secretary of the Interior is necessary. Under the 1906 Act no lease of lands of noncompetent members is effective unless it has the approval of the Secretary. There is no provision in the 1906 Act giving any jurisdiction to county or other State courts in any matter affecting the property of the Osages. That was later given in the 1912 Act, but with the limitations already referred to.

Moreover, section 9 of the Secretary's regulations required approval of leases by guardians, executors, or administrators (R. 14), thus:

> Lands of deceased allottees may be leased by the heirs jointly; the natural or legal guardian shall act for minor heirs, and said superintendent may execute leases in behalf of any absent heirs, or whose whereabouts is unknown. During the period of administration lands may be leased by administrators or executors for a period not to exceed one year, or in case no administrator or executor has been appointed, the superintendent of the Osage agency may execute leases in behalf of the undetermined heirs, but all such leases shall require the approval of the Secretary of the Interior to be valid.

3. Leases of homestead lands of competent adults.

Appellants concede that leases by *competent* adult members of their allotted homesteads are invalid unless approved by the Secretary (Appellants' brief, p. 43). It would be impossible to seriously contend otherwise in view of the plain terms of section 2 of the Act of June 28, 1906, *supra*, for under that section (seventh paragraph, 34 Stat. 542) competent members can not alienate their homesteads.

4. Lands held in common.

This branch of the case relates to tracts of the whole of which the defendants were in possession and which were claimed by them (1) as owners of an undivided unrestricted interest and by lease of the balance; the former concededly valid, the latter

asserted to be invalid because the interest was restricted and the lease not approved by the Secretary, and (2) by lease entirely; but only a portion of the leased interest was conceded valid and the rest asserted to be invalid because the interest was restricted and the lease not approved by the Secretary of the Interior.

The situation thus presented is unusual, but we believe under the peculiar conditions existing as to the lands of the Osage Indians, that the usual rights of an owner in common must be subordinated to the apparent purpose and intent of Congress.

The views expressed by the Court of Appeals on this point we consider cogent and forceful and fully covering the matter. We quote from the opinion (R. 66; 256 Fed. 12):

> As to instances where the land is held by tenants in common, part of whom are noncompetent and part competent or nonmembers of the tribe, a more perplexing situation is presented. Each of such tenants is, under the ordinary rules of tenancy in common, entitled to ingress, egress, and possession of the land and to a proper share of the benefits from the usage of the land. Such rights may be transferred by those legally capable of acting for themselves in such matters. But these considerations must bow to the requirements of the statute. Tenancy in common does not change a noncompetent into a competent Indian, nor in any wise increase the power of such to deal

with his interest in land so held. On the other hand, to permit the competent tenant to lease or use the entire tract or any undivided portion thereof, even though he accounted to the noncompetent tenant for his just portion, would completely obliterate that protection of supervision and approval which the statute carefully lodges in the Secretary alone. Therefore the conclusion seems necessary that no lease of any part or interest in Osage Indian land held in common where one or more of such tenants in common are noncompetents can be made without the approval of the Secretary. Only through such a conclusion can the protection required by the statute be preserved. Apparent injustice to the competent or nonmember tenant can not prevail against the statute, and such result is easily avoidable through the definite separation of land among the tenants through partition in accordance with the provisions of section 6 of the act of 1912, 37 Stat. 86.

Appellants contend that the decree below was erroneous as there was no ground for equitable interference, and that it went too far in that it prohibited them from entering into leases with the Osages.

The argument in support of this latter proposition runs something like this: It was the purpose of Congress to start the Osages on the road to complete emancipation; as to leases, the Act of 1906 provided that they should be subject " only to ap-

proval " by the Secretary of the Interior; this clearly indicated that the Osages were free to make such bargains as they saw fit, hence the Secretary had no power to make regulations governing leases, but merely to approve; therefore until lessees went into possession under a lease unapproved, the Secretary of the Interior had no occasion to object, and the ignoring or violation of the regulations in respect to making leases did not call for equitable relief. Appellants' brief, pp. 34–44.

We fail to see any such significance in the language of section 7 as that which appellants spell out of it. The language relating to approval is that the leases are to be " subject only to the approval of the Secretary of the Interior." Now the word " only " might very properly be said to indicate that no one other than the Secretary need approve to make the leases valid. It might have been intended to indicate that consent of the tribal council was not also necessary, or that approval by a county court was not required where the lessor was an orphan minor and had a guardian appointed by such court.

Appellants' interpretation seems forced, particularly in view of section 12 of the Act which authorized the Secretary to do all things necessary to carry out the purposes of the Act.

Now, the regulations (R. 7–15) required certain formalities with respect to the execution and approval of the leases. These regulations were not unreasonable, inappropriate, or inconsistent with

the Act, hence they should be held to be valid. *United States* v. *Morehead*, 243 U. S. 607.

Moreover, the regulations appear to have been considered, and seem to have been at least tacitly approved, by this court in *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, 436, 437.

But in any event, as the Court of Appeals said (256 Fed., at page 14):

> There is a clear ground of equitable interference by the Government stated in the bill, in that leases made contrary to the statute cast clouds upon the title which the Government holds in trust for the Indians.

Further, appellants have ignored the requests of the Secretary of the Interior, have defied his authority in the matter of leasing the lands of Osages, and have shown an utter disregard of all restraints designed to protect the Indians.

CONCLUSION.

It follows that the decree of the Circuit Court of Appeals was right and should be affirmed.

Respectfully submitted.

FRANK K. NEBEKER,
Assistant Attorney General.
H. L. UNDERWOOD,
Special Assistant to the Attorney General.

NOVEMBER, 1920.

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LA MOTTE ET AL. *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 121. Submitted December 10, 1920.—Decided January 24, 1921.

1. As an incident of its guardianship over the Osage Indians, the United States may sue to enjoin the assertion of rights under leases of restricted allotments obtained from members of the tribe without conforming to applicable provisions of the statutes and valid administrative regulations, and to enjoin the negotiation of other such unlawful leases in the future. P. 575.
2. Under the Act of June 28, 1906, concerning the Osage Indians, § 7 of which gives members the right to lease their restricted allotments and provides that such leases "shall be subject only to the approval of the Secretary of the Interior," the Secretary is authorized not merely to approve or disapprove leases after execution, but to make necessary reasonable regulations prescribing in advance as conditions to approval of leases the mode in which they shall be executed and presented to him and the terms and conditions they shall contain for the protection of the Indian lessors. *Id.*
3. The authority of the Secretary to make such regulations is covered by § 12 of the act, declaring that all things necessary to carry the act into effect and not otherwise specifically provided for shall be done under his direction and authority; and without that section it would be implied. P. 576.
4. Section 7 of the act, in providing that such leases shall be subject "only" to the approval of the Secretary, distinguishes between leases by individuals, to be approved by the Secretary alone, and leases for the tribe, which, under § 3, need the sanction of the tribal council as well. *Id.*
5. Under § 7 of the act, construed with §§ 3 and 6 of the Act of April 18, 1912, the approval of the Secretary is requisite to the validity of leases of restricted lands of minor allottees or minor heirs, given by their guardians with the sanction of the local state courts in which the guardianships were pending. P. 577.
6. Under § 7, *supra*, leases of restricted land made by an Indian parent having a certificate of competency, or by a white parent not a

member of the tribe, on behalf of minor allottees or heirs, require the Secretary's approval. P. 578.

7. Land allotted in the right of a deceased member cannot be leased by his heirs without the Secretary's approval if they are members of the tribe and without certificates of competency. *Id.*

8. A devise of a direct or inherited restricted allotment by a will made pursuant to § 8 of the Act of 1912, *supra*, and approved by the Secretary of the Interior, operates as a conveyance of the land free of restrictions. So *held*, in view of the broad language of the section and its interpretation by Congress. *Id.*

9. Neither under the common law nor under the statutes of Oklahoma may a testator impose an indefinite restriction on the right of his devisee to alienate the land devised. P. 580.

10. Members of the Osage Tribe, though without certificates of competency, may lease, without the Secretary's approval, allotments which they have purchased after such allotments had become unrestricted, since there is nothing in the Acts of 1906 and 1912, *supra*, to reimpose restrictions once removed, or to subject to restrictions all lands, however acquired, which members without such certificates may own. *Id.*

11. Purchasers or lessees of unrestricted, undivided interests in Osage allotments should be enjoined from exerting control over the lands, to the exclusion of Indian co-tenants of restricted interests; but in this case the injunction was so broad as to prevent them from dealing with their own interests, and should be modified. *Id.*

256 Fed. Rep. 5, modified and affirmed.

THE case is stated in the opinion.

Mr. T. J. Leahy and *Mr. C. S. Macdonald* for appellants.

Mr. Assistant Attorney General Nebeker and *Mr. H. L. Underwood*, Special Assistant to the Attorney General, for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit by the United States to enjoin the defendants (appellants here) from asserting or exercising any

right under certain leases obtained from individual Osage Indians without the approval of the Secretary of the Interior, and from negotiating or obtaining other leases of the same class without conforming to statutory provisions and administrative regulations alleged to be applicable. The District Court granted the major part of the relief sought and denied the rest. On cross appeals the Circuit Court of Appeals enlarged the relief granted, but refused a part of what was denied by the District Court. 256 Fed. Rep. 5. The United States then acquiesced and the defendants took a further appeal to this court.

Prior to the Act of June 28, 1906, c. 3572, 34 Stat. 539, the lands to which the suit relates were tribal lands of the Osage Indians, and after that act were divided under its provisions among the members of the tribe, as were also the tribal funds. Each member received 160 acres designated as a homestead and approximately 500 acres designated as surplus lands. The tribal funds were divided by placing a *pro rata* share to the credit of each member or his heirs in the United States Treasury. Except as otherwise provided, the homestead is to be "inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee," the surplus lands are to be "inalienable for twenty-five years" and nontaxable for three years, and the funds as distributed are to be held in trust by the United States for twenty-five years. These periods do not all have a common point of beginning, but nothing turns on that here. The act contains express provision (§ 2, Seventh) that the Secretary of the Interior, in his discretion, upon the petition of any adult member, may issue to such member "a certificate of competency" authorizing him to sell and convey any of his surplus lands, if, upon investigation, he is found fully competent and capable of transacting his own business and caring for his own affairs, and that upon the issue of such certificate the surplus lands shall become subject to taxation and the mem-

ber shall have "the right to manage, control, and dispose of his or her lands [other than the homestead] the same as any citizen of the United States." The interest on the funds held in trust and also certain revenues and moneys from other sources (§ 4, First and Second) are to be paid quarterly to the members, except that in the case of minors payments are to be made to the parents, so long as the moneys are not misused or squandered, and where the parents are dead payments are to be made to legal guardians. Upon the death of a member his lands, moneys, and interests "descend" to his "legal heirs, according to the laws" of Oklahoma, with an exception not material here (§ 6). The leasing of allotted lands is specially dealt with as follows:

"Sec. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: *Provided*, That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: *And provided further*, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

Besides several provisions indicating that the act is to be executed under the supervision of the Secretary of the Interior, there is a concluding section declaring:

"Sec. 12. That all things necessary to carry into effect the provisions of this Act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior."

An amendatory Act of April 18, 1912, c. 83, 37 Stat. 86, by its third section, subjects the property of deceased, orphan minor, insane and some other allottees to the jurisdiction of the county courts of Oklahoma in probate matters, but with the qualification, first, "that no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents," and, secondly, "that no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior." This amendatory act also contains a section dealing with disposals by will of which we shall speak presently.

In virtue of §§ 7 and 12 of the Act of 1906 the Secretary of the Interior adopted and promulgated regulations designating the mode in which leases of restricted lands for farming or grazing purposes should be executed and brought to his attention, indicating the terms and conditions which should be embodied in the leases for the protection of the Indian lessors, and informing intending lessors and lessees that where the regulations were not complied with the leases would not be approved.

The defendants (appellants here) are engaged in procuring leases of Osage lands for farming and grazing purposes, especially the latter. At times the leases are procured for their own benefit and at other times in the interest of cattlemen who desire and need large pastures. Where cattlemen are to be the beneficiaries, the defendants often take the leases in their own names and agree to protect the cattlemen against claims for trespass or damage. Some of the leases are for homesteads, others for surplus lands. Some are procured from adult allottees, or adult heirs of allottees, having certificates of competency, and some from like allottees or heirs where no such certificate has been issued. Others are obtained from parents or legal guardians of minor allottees or minor heirs, and still others from devisees holding under wills approved by the

Secretary of the Interior. Many of the leases are for restricted lands and yet are taken without conforming to the regulations and without obtaining the Secretary's approval. But notwithstanding this, the defendants proceed to use the lands for grazing purposes, or to enable others to do so, as if the leases were properly obtained. The failure to conform to the statute and the regulations is not accidental, but intentional and persistent.

The right of the United States to maintain the suit, although challenged by the defendants, is not debatable. The Osages have not been fully emancipated, but are still wards of the United States. The restrictions on the disposal and leasing of their allotments constitute an important part of the plan whereby they are being conducted from a state of tribal dependence to one of individual independence and responsibility; and outsiders, such as the defendants, are bound to respect the restrictions quite as much as are the allottees and their heirs. Authority to enforce them, like the power to impose them, is an incident of the guardianship of the United States. That relation and the obligations arising therefrom enable the United States to maintain the suit, notwithstanding it is without pecuniary interest in the relief sought. *Heckman* v. *United States*, 224 U. S. 413, 437–442; *United States* v. *New Orleans Pacific Ry. Co.*, 248 U. S. 507, 518; *United States* v. *Osage County*, 251 U. S. 128, 133. And see *Causey* v. *United States*, 240 U. S. 399, 402.

It is insistently urged that the regulations adopted and promulgated by the Secretary of the Interior are void and of no effect, and therefore that no right to relief can be predicated upon the defendants' disregard of them. The argument advanced is that the leasing provision says nothing about regulations; that the clause "subject *only* to the approval of the Secretary of the Interior" makes strongly against any regulations; that what is intended is to leave the Indian free to lease in his own way and on his

own terms, subject to the Secretary's approval or disapproval of the lease after it is given; and that the regulations, as adopted and promulgated, unwarrantably interfere with this freedom of action. In our opinion the insistence is not tenable, and for the following reasons:

The fact that the leasing provision says nothing about regulations is not important, for § 12 plainly enables the Secretary to employ any necessary means to carry that provision into effect. And, even without § 12, power to make regulations suitable to that end and consistent with the act would be implied. *United States* v. *Bailey*, 9 Pet. 238, 254–255.

The need for some regulations is obvious. The Osages among whom the lands were divided number about 2,000 and each member received an aggregate of approximately 660 acres, often in scattered tracts. All the lands were restricted in the beginning and most of them probably will remain so for several years. The leases are subjected to the Secretary's approval or disapproval to the end that the allottees and their heirs may be protected from their own improvidence and from overreaching by others. Both the lands and the Indians are remote from the seat of Government, and without some general and authoritative rules for the guidance of intending lessors and lessees it is certain that improvident and ill-advised leases would be given and multiplied in a way which would confuse and embarrass the Indians and greatly enhance the difficulties attending the Secretary's supervision.

We find nothing in the leasing provision indicating that no regulations are intended. True, the concluding proviso declares that "all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject *only* to the approval of the Secretary of the Interior." But this means, as the context and other parts of the act show, that leases given on restricted lands for the benefit of individual allottees, or

their heirs, and not for the benefit of the tribe, shall be subject to the approval of the Secretary of the Interior, but need not have the sanction of the tribal council. The word "only," on which the defendants place much emphasis, merely aids in marking an intended distinction between leases given for the benefit of individuals and those given for the benefit of the tribe, the latter, as § 3 shows, needing the sanction of the tribal council as well as the approval of the Secretary of the Interior.

Without doubt the regulations prescribed operate to restrain the Indian from leasing in his own way and on his own terms, but this is not a valid objection. If there were no regulations, the disapproval of a lease satisfactory to him would work a like restraint. Manifestly some restraint is intended, for the leasing provision does not permit the Indian to lease as he pleases, but only with the Secretary's approval.

The regulations appear to be consistent with the statute, appropriate to its execution, and in themselves reasonable.

It follows from what has been said that in the main the action of both courts below was correct; that is to say, the defendants were properly enjoined from asserting or exercising any right under leases of restricted lands given by individual Osages without the approval of the Secretary of the Interior, and from negotiating or procuring other leases of the same class without conforming to the regulations prescribed.

Several questions relating to particular leases or lands remain to be noticed.

The defendants have leases of restricted lands, belonging to minor allottees or minor heirs, which were given by guardians with the sanction of the local courts in which the guardianships were pending, but were not approved by the Secretary of the Interior. The District Court ruled that the Secretary's approval was not required and the Circuit Court of Appeals held to the contrary. We take the latter

view. It is supported by the comprehensive words of the concluding proviso of the leasing provision and is strengthened by the second qualification found in § 3 of the amendatory Act of 1912, under which the local courts obtain probate jurisdiction over the property of such minors, and by the proviso in § 6 of that act relating to the partition of inherited lands.

Some of the defendants' leases of restricted lands were given by parents on behalf of minor allottees or minor heirs, —one of the parents having a certificate of competency and the other being of white blood and not a member of the tribe. Both courts ruled that the Secretary's approval was essential, and rightly so, as we think. In giving such leases the parents act for the child, not for themselves, and approval by the Secretary is required by reason of the child's status, as would be true if the lease were given by a guardian.

One of the leases held by the defendants is for lands which, in the course of the division, were selected and allotted in the right of a member then deceased. Under the statute the lands passed to the member's heirs and the lease was procured from them. They are members and without certificates of competency. The lease has not been approved by the Secretary. Both courts regarded the lands as restricted and the lease as requiring the Secretary's approval. That view has since been sustained by us in *Kenny* v. *Miles*, 250 U. S. 58.

Two leases, not approved by the Secretary, are for lands which passed to devisees under wills approved by that officer and duly admitted to probate. Both testators were adult members of the tribe, not mentally incompetent. One was an allottee and the other the sole heir of a deceased allottee. In their hands the lands were restricted. The defendants insist that under the approved wills the lands passed to the devisees freed from the restrictions. If so, the leases did not require the Secretary's approval. Both

courts held that the lands continued to be restricted. The question is not free from difficulty, but we think it must be ruled the other way. Strictly speaking a devisee takes under the will as an instrument of conveyance, and not by descent as an heir. This form of alienation was within the restriction imposed by the Act of 1906, *Taylor* v. *Parker*, 235 U. S. 42, but the amendatory Act of 1912 relaxed the restriction by declaring:

"Sec. 8. That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: *Provided*, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

This provision is broadly written, is in terms applicable to restricted lands and funds, and enables the Indian to dispose of all or any part of his estate by will, in accordance with the state law, if his will be approved by the Secretary. True, it does not say that a disposal by an approved will shall put an end to existing restrictions, but that is an admissible, if not the necessary, conclusion from its words. After its enactment the Secretary of the Interior construed it as having that meaning, and it was administered accordingly in that department up to the time of this suit. And that Congress intended it should have that meaning is at least inferable from a general act of the next session respecting wills by Indian allottees and their approval by the Secretary (c. 55, 37 Stat. 678); for that act, while providing that "the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period," expressly excepted the Osages from its reach. These matters apparently were not brought to the attention of the courts below. We regard them as of suffi-

cient weight to put the question at rest. In one of the wills the testator attempted to impose an indefinite restraint on the devisee's right to alienate the land; but, whether the attempt be tested by the common law or by the local statutes, it plainly was of no effect. We modify the decree by excluding this class of leases from the injunction.

Some of the leases are for lands which were purchased by the lessors after the lands in regular course had become unrestricted. Because the lessors were members of the tribe and without certificates of competency the Circuit Court of Appeals held that the leases were subject to the Secretary's approval. The District Court had held the other way. We think the District Court was right. There is no provision in the Act of 1906 or that of 1912 which reimposes restrictions after they have been removed, or which subjects to restrictions all lands, however acquired, which a member without a certificate of competency may own. See *McCurdy* v. *United States*, 246 U. S. 263. The restrictions reach such lands only as were allotted to the member or were inherited by him from another in whose hands they were restricted. Many members who are without certificates of competency have incomes and property which they are free to deal with as they choose. Some have purchased from white men having full title and an undoubted right to sell. *See Levindale Lead Co.* v. *Coleman*, 241 U. S. 432. As to this class of leases we so modify the decree that the injunction shall not include them.

Through purchases or leases from heirs who have certificates of competency, or are white men and not members of the tribe, the defendants have come lawfully to own, or have leases of, undivided interests in particular lands the remaining interests in which continue to be restricted; and the defendants are using or exerting control over these lands to the exclusion of the Indian owners of the restricted interests. This use or control is colorably based on unapproved leases and other forms of consent given by

the other owners which are without legal sanction. Both courts rightly condemned these acts and portions of the injunction are directed against them. But as to some of the lands the injunction is open to an objection which the defendants urge against it, in that it prohibits them from "in any manner dealing with said lands, or any part thereof, without the consent of the Secretary of the Interior." This prohibition would prevent them from selling their unrestricted interests, although that may not have been intended. It should be confined to the restricted undivided interests of the Indian owners; and we modify the decree accordingly.

Subject to the modifications here made the decree is affirmed.

Decree modified and affirmed.